LIBRARY
SUPREME COURT, U. S.

Office Supreme Ct. U.S.
FILED
OCT 12 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

CHARLES B. MAHIN,
134 South La Salle Street,
Chicago, Illinois 60603,
Counsel for National Woodwork Manufacturers Association, et al.

Of Counsel:
RICHARD S. RATCLIFF,
JOHN A. MCDONALD,
JAMES M. SHERIDAN,
SPRAY, PRICE, HOUGH & CUSHMAN,
Chicago, Illinois 60603.

INDEX.

	PAGE
STATUTE INVOLVED	1
QUESTIONS PRESENTED	1
STATEMENT	4
The Decision of the Board	4
The Decision of the Court Below	5
SUMMARY OF ARGUMENT	6
ARGUMENT	12
I. Section 8(e) Proscribes Agreements Between a Union and an Employer to Boycott the Products of Other Employers, Such as Rule 17, Whether or Not the Boycotting Union Has (1) a Work Preservation Objective or (2) a Labor Dispute with Such Other Employers	12
A. The Board Erroneously Assumes That Under Section 8(e) the Existence of a Work-Preservation Objective Negates the Existence and Significance of a Proscribed Objective of Refusing to Handle the Products of Another Employer and Fails to Give Effect to the Latter Objective	12
B. Section 8(e), by Its Terms, Proscribes Product Boycott Agreements	18
C. Congress Intended Section 8(e) to Reach Agreements to Boycott Products of Other Employers	19
D. Section 8(e) Should Be Construed Consistently With Section 8(b)(4)(B)	36
E. The Board's Narrow Application of Section 8(e) Would Create a Double Standard in Product Boycott Law	42
F. The Work-Assignment and Subcontracting Cases Relied on by the Board Are Not Properly Applicable to the Product Boycott Proscriptions of Rule 17 Herein	43

PAGE

II. Rule 17 Is Unlawful Even Under the Board's Restrictive Interpretation of Section 8(e) 49

A. Rule 17 Has Substantial and Direct Force and Effect Outside the Work Unit 50

B. By Dictating the Kind of Doors That Could or Could Not Be Used in the Philadelphia Market, Rule 17 Had Substantial and Direct Effect on Work and Production in the Manufacturing Plants of the "Other Employers" 51

C. Rule 17 Violates Section 8(e) Because Its Purpose Was the Protection of Work Opportunities for Union Members Generally, Rather Than Only Those in a Specific Work Unit 52

III. Rule 17, Violative of Section 8(e) Proper, Is Not Saved by the Construction Industry Proviso 56

IV. By Forcing and Requiring the Contractors to Enter Into Rule 17, Which Is Unlawful Under Section 8(e), the Union Violated Section 8(b)(4)(A) 58

V. The Board's Brief Fails to Sustain the Product Boycott Immunity Which It Seeks to Write Into Section 8(e) 58

VI. The Exemption of Product Boycott Agreements Which the Board Would Write Into Section 8(e) Would Be Detrimental to the Economy and the Public Interest 65

CONCLUSION 66

APPENDIX 67

Authorities Cited.

Cases.

PAGE

Alco-Gravure, Division of Publication Corporation, 160 NLRB No. 90, 63 LRRM 1126 (September 27, 1966) 52, 54, 55

Allen Bradley Co. v. Local Union No. 3, IBEW, 41 F. Supp. 727 (S. D. N. Y. 1941) 62

Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U. S. 797 (1945) 6, 13, 14n, 17, 38, 39, 62, 65

Cardinal Industries, Inc., 136 NLRB 977 (1962) .. 36, 52, 57n

District No. 9, IAM v. NLRB, 315 F. 2d 33 (D. C. Cir. 1962) 44n

Fibreboard Paper Products Corp. v. NLRB, 379 U. S. 203 (1964) 63, 64

Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc., 134 NLRB 1354 (1961), aff'd 315 F. 2d 33 (D. C. Cir. 1962) 58n

Hillbro Newspaper Printing Company, 135 NLRB 1132 (1962), aff'd 311 F. 2d 121 (D. C. Cir. 1962) 58n

Houston Insulation Contractors Association v. NLRB, 357 F. 2d 182 (5th Cir. 1966) 44n

Island Dock Lumber, Inc., 145 NLRB 484 (1963), aff'd 342 F. 2d 18 (2d Cir. 1965) 47, 57n

Joliet Contractors Association v. NLRB, 193 F. 2d 833 (7th Cir. 1952) 13, 39, 50, 65

Joliet Contractors Association v. NLRB, 202 F. 2d 606 (7th Cir. 1953), cert. denied 346 U. S. 824 (1953) 7, 13, 39, 46, 62n

Local 1976, United Brotherhood of Carpenters v. NLRB, 357 U. S. 93 (1958) 18n, 21, 42, 49n, 59-60

PAGE

MacDonald-Scott & Associates, 131 NLRB 787 (1961) 14n, 41n

Martin Company (The), 131 NLRB 1010 (1961) ... 14n, 41n

Meat and Highway Drivers, Dockmen, etc. v. NLRB, 335 F. 2d 709 (D. C. Cir. 1964) 44n

NLRB v. Denver Building & Construction Trades Council, 341 U. S. 675 (1951) 14n

NLRB v. International Rice Milling Co., 341 U. S. 665 (1951) 8n, 17, 18-19

NLRB v. Joint Council of Teamsters No. 38, 338 F. 2d 23 (9th Cir. 1964) 44n

NLRB v. Local 11, etc. (General Millwork case), 242 F. 2d 932 (6th Cir. 1957) 7, 13, 39, 41, 46, 62, 65

NLRB v. Washington-Oregon S. W. D. C. (Sound Shingle case), 211 F. 2d 149 (9th Cir. 1954) 38, 42

Orange Belt District Council of Painters No. 48 v. NLRB, 328 F. 2d 534 (D. C. Cir. 1964) 44n

Packard Motor Car Company v. NLRB, 330 U. S. 485 (1947) 18n

Retail Clerks Union Local 770 v. NLRB, 296 F. 2d 368 (D. C. Cir. 1961) 44n

Sound Shingle Co., 101 NLRB 1159 (1952), enfd. 211 F. 2d 149 (9th Cir. 1954) 60

Threlfall Construction Co., 152 NLRB No. 59, 59 LRRM 1131 (1965), aff'd 361 F. 2d 547 (D. C. Cir. 1966) 47n, 57n

Todd Shipyards Corp. v. Marine and Shipbuilding Workers Union, 344 F. 2d 107 (2d Cir. 1965) 44n

United Mine Workers v. Pennington, 381 U. S. 657 (1965) 48n

PAGE

United States v. Hutcheson, 312 U. S. 219 (1941) 17

United States v. Painters' District Council No. 14, etc. ("Kitchen Cabinet" case), 44 F. 2d 58 (N. D. Ill. 1930), aff'd per curiam, 284 U. S. 582 (1931) 50

Wadsworth Building Company, 81 NLRB 802 (1949), enfd. 184 F. 2d 60 (10th Cir. 1950) 46

York Corporation, 121 NLRB 676 (1958) 40

Statutes.

Clayton Act, ch. 323 § 6, 38 Stat. 731 (1914), 15 U. S. C. § 17 ..... 48n

National Labor Relations Act, as amended, 1947, 61 Stat. 136, 29 U. S. C. § 151, et seq.:

Taft-Hartley Act .....
.....8, 14n, 16, 17, 19, 20, 21, 22, 23, 31, 59, 60

Section 8(b(4)(A) ..14n, 16, 20, 21, 22, 38, 40, 46, 58, 60

National Labor Relations Act, as amended, 1959, 73 Stat. 519, 29 U. S. C. § 151, et seq.:

Landrum-Griffin Act 19, 23, 40, 43n

Section 8(a)(5) 63

Section 8(b)(4)(A) 1, 5, 11, 25, 26, 27, 36, 58, 67

Section 8(b)(4)(B) 1, 2n, 6n, 9, 12, 18, 21, 26, 27, 36,
.....37, 41, 42, 43, 52, 53, 54, 58, 60, 67

Section 8(e) .....
..... 1-22, 25-30, 34-37, 42-44, 47-49, 51, 52, 56-67

Legislative Material.

H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., pp. 38, 39; I Leg. Hist. (1959), pp. 942, 943 ...25n, 34n, 56

S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., pp. 5, 79, 80; I Leg. Hist. (1959), pp. 401, 475, 476 ....23n, 24n

II Leg. Hist. (1947), p. 1623; 93 Cong. Rec. 6859 ....14n, 59

I Leg. Hist. (1959), p. 29 ..... 23n

PAGE

I Leg. Hist. (1959), pp. 142, 255, 328, 595, 681, 942 . . 22n, 25n
I Leg. Hist. (1959), p. 619 . . . . . 23n
I Leg. Hist. (1959), p. 683 . . . . . 26n
I Leg. Hist. (1959), pp. 687, 751 . . . . . 59n
I Leg. Hist. (1959), p. 755 . . . . . 26n
II Leg. Hist. (1959), pp. 865, 929 . . . . . 59n
II Leg. Hist. (1959), p. 989; 105 Cong. Rec. 1296 31
II Leg. Hist. (1959), p. 1052; 105 Cong. Rec. 6290 31
II Leg. Hist. (1959), pp. 1161-63; 105 Cong. Rec. 6656-57 23
II Leg. Hist. (1959), pp. 1193-98; 105 Cong. Rec. 6666-71 . . . . . 24n
II Leg. Hist. (1959), p. 1195; 105 Cong. Rec. 6668 27
II Leg. Hist. (1959), p. 1242; 105 Cong. Rec. 6730 . . . . . 22n
II Leg. Hist. (1959), p. 1377; 105 Cong. Rec. 17327 28
II Leg. Hist. (1959), p. 1428; 105 Cong. Rec. 17884 . . . . . 22n, 29, 62
II Leg. Hist. (1959), p. 1431; 105 Cong. Rec. 17898 . . . . 21n
II Leg. Hist. (1959), p. 1432; 105 Cong. Rec. 17899 28
II Leg. Hist. (1959), p. 1433; 105 Cong. Rec. 17900 . . . . . 10, 34, 47, 56
II Leg. Hist. (1959), p. 1453 . . . . . 29n
II Leg. Hist. (1959), p. 1481; 105 Cong. Rec. 7106 . . . . . 23n
II Leg. Hist. (1959), p. 1517; 105 Cong. Rec. 14177 . . . . 26n
II Leg. Hist. (1959), p. 1527; 105 Cong. Rec. 14381 . . . . 26n
II Leg. Hist. (1959), p. 1543; 105 Cong. Rec. 15195 . . . 32
II Leg. Hist. (1959), p. 1576; 105 Cong. Rec. 15440 29
II Leg. Hist. (1959), p. 1577; 105 Cong. Rec. 15541 33
II Leg. Hist. (1959), p. 1580; 105 Cong. Rec. 15544 . . . . 20n

PAGE

II Leg. Hist. (1959), p. 1581; 105 Cong. Rec. 15545 32
II Leg. Hist. (1959), p. 1593; 105 Cong. Rec. 15557 29
II Leg. Hist. (1959), p. 1702; 105 Cong. Rec. 15892 ..23n, 26
II Leg. Hist. (1959), p. 1706; 105 Cong. Rec. 16589 .... 16n
II Leg. Hist. (1959), p. 1707; 105 Cong. Rec. 16590 27
II Leg. Hist. (1959), p. 1708; 105 Cong. Rec. 16590 27
II Leg. Hist. (1959), p. 1715; 105 Cong. Rec. 18128 34
II Leg. Hist. (1959), p. 1721; 105 Cong. Rec. 18134 29
II Leg. Hist. (1959), p. 1815; 105 Cong. Rec. 19785 56
II Leg. Hist. (1959), p. 1829 ..... 36n
II Leg. Hist. (1959), p. 1861; 105 Cong. Rec. 20005 56

Miscellaneous:

Building Supply News, pp. 100, 103 (March 1961) 46n

Dannett, The Legality of Subcontracting Provisions Under Section 8(e), in Slovenko (Ed.): Symposium on the Labor-Management Reporting and Disclosure Act of 1959, p. 905 (1961) 64n

McClellan, Crime Without Punishment, pp. 263, 264 (1962) 33n

Schwartz, Comments, in Slovenko (Ed.): Symposium on the Labor-Management Reporting and Disclosure Act of 1959, p. 911 (1961) 64n

St. Antoine, Secondary Boycotts and Hot Cargo: A Study in Balance of Power, 40 U. Det. L. J. 189, 206-7 (1962) 36n

Sutherland, Statutory Construction, § 4502 (3d ed. 1943) 18n

United States Department of Commerce, Census of Business, Report Form CB-52A-T (12-18-61) 46n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 111.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

STATUTE INVOLVED.

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.*), are printed in the Appendix, *infra*, pp. 67-68.

QUESTIONS PRESENTED.

National Woodwork Manufacturers Association (herein "NWMA") does not agree with certain assumptions and implications in the National Labor Relations Board's (herein the "Board") statement of the "Question Pre-

sented." With reference to the words "traditionally performed," NWMA contends that past practice is neither a significant nor a controlling factor in the issues of this case. Moreover, in any event, jobsite fabrication and finishing of "blank" doors was not traditionally performed by the Union in the sense of it being universal and standard practice in Philadelphia. About a third of the doors shipped into Philadelphia by Mohawk Flush Doors, Inc. and United States Plywood Corporation were prefabricated doors (R. 26 n. 14). None of the formica-laminated doors made by Oxford Plastic Products Company (herein "Oxford") could feasibly be fabricated on the jobsite (R. 101-102).

Rule 17 expressly embodies a boycott objective. Further, the record, as a whole, does not support the Board's assumption that the *"sole"* objective of Rule 17 was work preservation. Even assuming *arguendo* that *a* purpose of Rule 17 was work preservation, the objective and means by which this was to be attained was the boycott of prefabricated doors.[1]

Therefore, we respectfully submit that the questions in this Cause No. 111 are more appropriately stated as follows:

Whether an agreement between a union and a jobsite contractor to boycott a prefabricated product manufactured

---

1. The Board conceded that the effect of Rule 17 "would bring about a reduction or partial cessation of business with the millwork suppliers . . ." (R. 26). Further, with respect to its findings of violation of Section 8 (b) (4) (B), the Board stated that the Union's target and objective was clearly the manufacturers and distributors of prefabricated doors (R. 29). This unlawful boycott was accomplished by the enforcement of Rule 17 (R. 11-15). It is clear that the rule and its objectives did not change but continued the same throughout the entire period. Obviously the rule did not have solely a work-preservation objective when measured against Section 8(e) proscriptions and a boycott objective when measured against Section 8(b)(4)(B) proscriptions; rather, it had dual objectives at all times—one lawful and the other unlawful.

elsewhere is unlawful under Section 8(e) only if the union has a dispute with the manufacturer of the product.

Whether a union objective of work preservation immunizes from the proscriptions of Section 8(e) an agreement between the union and a jobsite employer to boycott prefabricated products manufactured offsite by another employer.

Whether in the case of a construction jobsite agreement between a union and a contractor to boycott prefabricated products made by a manufacturer elsewhere, the affixation of "primary" and "secondary" labels to the relations involved is necessary and determinative of violation of Section 8(e).

Whether Union Rule 17 herein violated Section 8(e).

STATEMENT.

Union[2] Rule 17,[3] by its terms and as enforced by the Union, barred from the Union's five-county jurisdictional area prefabricated millwork and doors manufactured by NWMA members and others elsewhere[4] (R. 86-87, 89, 109-110, 111-112, 113). The Union's drive to ban prefabricated doors was implemented by the boycotts and work stoppages which led to the charges against the Union and the proceedings below (R. 159).

To avoid repetition, NWMA requests that the more complete statement of facts set forth at pages 5-10 of its brief in Cause No. 110 be accepted as its statement of facts herein.

The Decision of the Board.

The complaint of the Board's General Counsel charged, *inter alia,* that Union Rule 17 violated Section 8(e) because it was an agreement between the Union and the con-

---

2. Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the "Council" or the "Union").

3. "Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America. No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for batts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections." (R. 10.)

The first sentence of this rule (which the Board found violative of Section 8(e)) was not enforced by the Union and is not directly in issue herein.

4. Hardwood Products Corporation, Neenah, Wisconsin; Mohawk Flush Doors, Inc., Sunbury, Pennsylvania, and South Bend, Indiana; and Oxford Plastic Products Company, Oxford, Pennsylvania.

tracting employer prohibiting such employer from "handling, using, selling, transporting or otherwise dealing in any of the products of any other employer," and that the enforcement of Rule 17 violated Section 8(b)(4)(A).

The Trial Examiner, conceding that Rule 17 would bring about a reduction or partial cessation of business with millwork suppliers of prefabricated doors, nevertheless held that the purpose of the rule was to regulate the relations between the general contractor and his own employees; that the effect on manufacturers and suppliers was only incidental; and that, as a lawful work-protection or work-preservation provision, Rule 17 did not violate Section 8(e).[5]

The Board, without comment on the merits, summarily adopted the Trial Examiner's decision that Rule 17 did not violate Section 8(e) and that, although Rule 17 was enforced by Union coercion of employers, there was no violation of Section 8(b)(4)(A) (R. 26-28).

The Decision of the Court Below.

The Court reversed the Board's findings of no violation of Sections 8(e) and 8(b)(4)(A) and held that Rule 17 was an unlawful agreement whereby the employer "ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer . . ." The Court pointed out that Section 8(e) and the proviso were not intended to immunize union boycotts of products manu-

5. In this connection, we suggest that in its brief, at page 5, the Board appears to be reading into the decision below the vein of its argument before this Court. The words "primary" and "secondary" and the reference to a "dispute" (with another employer) do not appear in the decisional findings below on Section 8(e). References herein to the "Board's Brief" are to its brief in No. 111, this term, unless otherwise indicated.

factured elsewhere for installation at jobsites. The Court said (R. 166):

> "The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8(e) itself. The legislative history shows that it was explained by Senator Kennedy that the 'proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite.'"

The Court directed the Board to enter an order in accordance with its opinion.[6]

SUMMARY OF ARGUMENT.

1. Rule 17, by its terms and as applied, prohibited the installation of prefabricated doors in the Union's five-county jurisdictional area. This resulted in an embargo on the thousands of prefabricated doors which had been flowing into the Philadelphia market and prevented door manufacturers throughout the United States from distributing prefabricated doors for use in that area.

This area product boycott was the counterpart of the Electrical Workers' New York embargo of "foreign" electrical fixtures in *Allen Bradley*,[7] the Glaziers Union's Chi-

6. In a companion case, *NWMA* v. *NLRB*, No. 110, this term, NWMA seeks reversal of the finding of the Court below (affirming the Board's finding) that the Union's boycott of prefabricated doors on the project of contractor Frouge did not violate Section 8(b)(4)(B). NWMA's position is stated in its separate brief in No. 110, filed on September 9, 1966. The Court and Board findings that the Union boycotts of prefabricated doors on three other jobs violated Section 8(b)(4)(B) are not in issue in either No. 110 or this case because no petition was filed with respect thereto. We, therefore, request that this Court disregard any contention made by the American Federation of Labor and Congress of Industrial Organizations, in its brief as *amicus curiae*, that the findings of Section 8(b)(4)(B) violation below were erroneous.

7. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

cago-Joliet boycott of preglazed windows in *Joliet Contractors*,[8] and the Carpenters Union's Cincinnati boycott of prehung doors in *General Millwork*.[9]

Rule 17 was a union-contractor agreement by which the Philadelphia contractors ceased and refrained from handling and using products manufactured by other employers within the express proscriptions of Section 8(e) of the Act.

The Board's holding that Rule 17 was only a "primary" work-preservation agreement outside the proscriptions of Section 8(e) is erroneous. In so holding, the Board ignored the patent boycott objective and embargo effect of Rule 17. Contrary to the Board's apparent view, the existence of a lawful work-preservation objective does not negate the existence of a proscribed boycott objective. Rather, Rule 17 embodied dual objectives: (1) that of preserving or obtaining work for Union members; and (2) that of boycotting prefabricated doors manufactured by other employers. Only by the accomplishment of the boycott objective could the work-protection objective be realized.

Moreover, contrary to the Board's contention, the existence of a dispute between the boycotting union and the manufacturer of the boycotted products is not a requisite of violation. Section 8(e) reaches agreements to boycott blacklisted products of "other employers," whether the union objects because the product is made by employees belonging to no union or the "wrong" union, or because it is not made under so-called "standard" working conditions, or because the product is more completely fabricated than the union desires.

---

8. *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (7th Cir. 1953), cert. denied 346 U. S. 824 (1953).

9. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957), enforcing 113 NLRB 1084 (1955).

Further, by disregarding the inherent trade restraint and embargo aspects of product boycotts, the Board contravenes the balance between the interests of the business economy, on the one hand, and the interests of labor, on the other—which is dictated by national policy.[10]

2. Section 8(e), by plain and unequivocal language, prohibits "*any* contract or agreement, *express or implied,*" whereby an employer agrees with a union to refrain from "handling, using, selling, transporting or otherwise dealing in *any of the products of any other employer* . . ." (Emphasis added.) The only exemptions from this broad prohibition are: (1) the limited exemption under Section 8(e) for the construction industry covering "work to be done at the site of the construction"; and (2) the broad exemption for the "apparel and clothing industry" from both Section 8(e) and Section 8(b) (4) (B).

Moreover, the legislative history shows that Congress intended Section 8(e) to reach boycott agreements such as Rule 17 in this case.

The Board's attempt by narrow interpretation to write into Section 8(e) an exemption for product boycott agreements, such as Rule 17, is unwarranted and erroneous. The references in the legislative history to the Teamsters Union and "hot cargo" agreements were illustrative only and were employed by the proponents of the 1959 amendments to the Taft-Hartley Act as an opening wedge for the broad proscriptions against boycott agreements, which were eventually enacted. This history reveals that the proponents intended, and the opponents understood and finally accepted, that Section 8(e) would broadly prohibit employer-union agreements banning prefabricated and other products manufactured by other employers.

10. *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 673 n. 7 (1951).

Congress intended that Section 8(e) should be construed consistently with Section 8(b) (4) (B). These sections are *in pari materia*. Section 8(e) was intended to complement Section 8(b) (4) (B) by prohibiting agreements to permit secondary boycotts in the future which, if consummated by union economic pressures, would violate Section 8(b) (4) (B). Therefore, the many cases under Section 8(b) (4) (B) holding that work preservation is not a defense to product boycott conduct, and that the existence of a dispute with the manufacturer of the boycotted product is not a requisite of violation, provide compelling guidance to like interpretation of Section 8(e).

The Board's narrow application of Section 8(e) would create a double standard in product boycott law. Work preservation, which has never been a defense under Section 8(b)(4)(B), would *ipse dixit* become a defense under Section 8(e). This would have the anomalous result that identical product boycott agreements would be lawful if enforced by litigation (or threats thereof) but would be unlawful if enforced by economic pressure. This would open a wide and unintended loophole of contractual product boycott immunity in the construction and other industries.

3. The work-assignment and subcontracting cases relied on by the Board are not properly applicable herein. The cases in which these subcontracting rules developed involved the subcontracting of services or the assignment of work, as such. Further, the assignments, for the most part, involved work performed in, or directly connected with, the contracting employer's operation or the union's jurisdiction. These cases cannot properly be applied to justify the product boycott dictated by Rule 17 in the instant case. We have here a *purchase of products*—not an *assignment of work*. The prefabricated doors involved

herein were manufactured at distant plants far from the Philadelphia construction area and the Union's jurisdiction.

Prefabricated doors and other building components are *products* and have been consistently so considered in the many product boycott cases, by United States Government agencies, and in commercial and business usage in the industry.

The distinction between jobsite work and the purchase of manufactured products is recognized in the construction proviso of Section 8(e) itself. Senator Kennedy explained that the proviso does not provide immunity for "boycotts of goods manufactured in an industrial plant for installation at the jobsite . . ." [II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1433 (hereinafter cited as "Leg. Hist. (1959)")]. The Board and the circuit courts have recognized and accepted this distinction.

So, in the present case, Rule 17's ban on prefabricated products was not a work-assignment restriction but, rather, was an embargo on manufactured products—and clearly within the proscriptions of Section 8(e). This section, in accordance with its plain language and the legislative intent, proscribes product boycott agreements such as Rule 17 herein.

4. In addition, the Board in this case has misapplied its own rules because, even under the Board's limited construction, Rule 17 demonstrably violates Section 8(e). This is because (1) the rule has direct and substantial force and effect outside the work unit on the flow of commerce and distribution of products; (2) it substantially affects working and production conditions at door-manufacturing plants; and (3) its objective extends to the protection of job opportunities for Philadelphia Union members generally—outside as well as within the work unit.

5. Rule 17, being violative of Section 8(e) proper, is not saved by the construction proviso. This is because the proviso applies only to work actually done at the construction site—and does not apply to prefabricated products manufactured elsewhere.

6. Rule 17 being unlawful under Section 8(e), the Union violated Section 8(b) (4) (A) by applying economic pressure to maintain it. This constitutes "entering into" within the meaning of the statute.

7. Immunity for product boycott agreements such as Rule 17 would enable unions throughout the United States to draw boycott walls around their respective communities banning the needed technologically improved products of many industries. This would be detrimental to the economy and the public interest.

Therefore, the decision of the Court below that Rule 17 and its enforcement violated Section 8(e) and Section 8(b) (4) (A) should be affirmed.

ARGUMENT.

I. SECTION 8(e) PROSCRIBES AGREEMENTS BETWEEN A UNION AND AN EMPLOYER TO BOYCOTT THE PRODUCTS OF OTHER EMPLOYERS, SUCH AS RULE 17, WHETHER OR NOT THE BOYCOTTING UNION HAS (1) A WORK PRESERVATION OBJECTIVE OR (2) A LABOR DISPUTE WITH SUCH OTHER EMPLOYERS.

A. The Board Erroneously Assumes That Under Section 8(e) the Existence of a Work-Preservation Objective Negates the Existence and Significance of a Proscribed Objective of Refusing to Handle the Products of Another Employer and Fails to Give Effect to the Latter Objective.

By proceeding from the false premise that work-preservation objectives and proscribed boycott objectives are mutually exclusive, the Board deliberately ignores the reality of product boycott situations such as we have in this case.

However the Board may seek to immunize Rule 17 by its primary-secondary dichotomy and its work-preservation concepts, the plain fact is that Rule 17, expressly and by clear intention, was an agreement to embargo from Philadelphia prefabricated doors and millwork manufactured elsewhere throughout the United States. Rule 17 banned the handling of any millwork "coming from a mill" where cutting and fitting had been done and "any doors or transoms" which had been prefitted. Its patent purpose was to close the Union's jurisdictional area to the thousands of prefabricated doors that had been flowing into that area (R. 74-75, 83, 100-105). Moreover, the enforcement of Rule 17 accomplished this objective. All of the hundreds of prefabricated doors which had been purchased for use on the four jobs in this case were banned completely—except only on one job, after an exaction was paid—and it was so found below in the Section 8(b)(4)(B) findings of violations. The Court stated (R. 163): "In the case at bar the Union's target was and is prefabricated doors. . . ." The Board said

(R. 29): "... Thus, the real targets of the District Council's conduct were the respective owners of the three projects, the mill suppliers, and the door manufacturers. ..."

Thus, under Rule 17, we have in this case the counterpart of the Glaziers Union's product boycott in *Joliet Contractors*,[11] which caused the use of factory-glazed windows to "become a thing of the past" in Chicago; the New York Electrical Workers' embargo of "foreign" electrical fixtures in *Allen Bradley*;[12] and the Carpenters Union's boycott of prehung doors in *General Millwork*.[13]

In short, it would be difficult to find a more complete trade barrier of any product than the embargo of prefabricated doors contemplated and accomplished by Rule 17 in this case. By any perceptive appraisal, the real force and effect of Rule 17 was to prevent door manufacturers throughout the United States from distributing prefabricated factory-finished doors in the Philadelphia area.[14]

The Board, in viewing Rule 17 under Section 8(e), ignores the broad embargo impact of the rule on products manufactured by other employers and finds only an objective of "work preservation" for local employees. Finding only what it calls a "primary work-preservation" purpose,

11. *Joliet Contractors Association* v. *NLRB*, 193 F. 2d 833, 840 (7th Cir. 1952); *idem*, 202 F. 2d 606 (7th Cir. 1953).

12. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

13. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957). Similarly, see cases reviewed in NWMA's Brief in No. 110, pp. 35-45.

14. On every job involved herein, when the contractor pleaded with the Union to permit the installation of the doors, the response was the same: "Rule 17 prohibits it" (R. 11-16). Thus, viewed realistically, Rule 17, in practical effect, tells every contractor in Philadelphia: "You cannot buy prefabricated doors from door suppliers and manufacturers." It tells every manufacturer of doors in the United States: "You cannot sell factory-machined, finished or prehung doors to any contractor for use in the Philadelphia area." The rule bluntly and unequivocally bans prefabricated doors.

the Board then argues that Section 8(e) does not proscribe such "primary" agreements. In so doing, the Board treats what it calls "primary" work-preservation objectives and "secondary" boycott objectives as mutually exclusive—i.e., that an agreement must be all one or the other.[15] This is patently wrong. As was demonstrated in NWMA's Brief in No. 110 (pp. 35-40), in many product and other secondary boycott cases the unions had dual objectives—self-interest (i.e., work preservation) *and* a proscribed boycott objective.[16]

This precisely characterizes Rule 17 in the present case. Rule 17 embodied the dual, but related, objectives of (1) preserving or gaining work for Union members; *and* (2) boycotting prefabricated doors of other employers. Only by the accomplishment of the latter objective could the former objective be realized.[17] Therefore, contrary to the

15. The Board's Berkeleian refusal to perceive and give recognition to the boycott objective and impact of Rule 17 does not eliminate it. That this is so is attested not only by the record but by the fact that it is the national door manufacturing industry, whose doors are embargoed by Rule 17, that has prosecuted the case through the extensive proceedings below and to this Court. It was for this same reason that it was the Allen Bradley Co., the General Electric Company, and other "foreign" manufacturers of electrical products which sought to break the New York embargo of their products by the Electrical Workers Union in *Allen Bradley* (325 U. S. 797).

16. In the early case of *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 689 (1951), this Court emphasized that a boycotting union may have more than one objective, and that there is violation if *an* objective is proscribed. In the Senate-House Conference Report on the Taft-Hartley amendments, the language of Section 8(b) (4) (A) (now "(B)") was specifically changed from "for the purpose of" to "where an object thereof is" to avoid, under that section, the "sole" or "principal" purpose contention now being made by the Board under Section 8(e). II Legislative History of the Labor Management Relations Act of 1947, p. 1623 (hereinafter cited as "Leg. Hist. (1947)"), 93 Cong. Rec. 6859.

17. *MacDonald-Scott & Associates*, 131 NLRB 787, 800 (1961); *The Martin Company*, 131 NLRB 1010, 1018 (1961), *infra*, p. 41.

Board's apparent assumption, the existence of a work-preservation objective by a contracting union does not *per se* negate the existence of a proscribed boycott objective. On the contrary, as in this case, there can be both such objectives.

Further, contrary to the Board's contention, Section 8(e)'s proscription of an agreement to boycott the products of another employer is not dependent on the existence of a labor dispute between the contracting union and the manufacturer of the product.

Yet the Board here seems to be pressing a primary-secondary formula which, under Section 8(e), would immunize clear-cut product boycott agreements unless the boycotting union had a so-called "primary dispute" with the manufacturers of the blacklisted product.[18]

In its brief the Board at times retreats slightly from the position that an existing dispute with a specific employer is an absolute requisite of violation of Section 8(e). But the inflexible principle it tries to draw from the segments of legislative history to which it refers is that 8(e) is narrowly limited to a restricted form of "hot cargo" agreements involving a "primary employer" with whom the union has an actual dispute and a so-called "secondary employer" with whom the union has a boycott contract. This

---

18. Board's Brief, p. 12:

"The background and context of Section 8(e) demonstrate that the broad language of that section was intended only to prohibit agreements designed to put pressure upon employers with whom the union had no dispute, in order to force them to cease dealing with employers with whom the union did have a dispute (so-called "secondary" agreements)....."

Board's Brief, pp. 21-22:

"On the contrary, it [Section 8(e)] must be read as covering only such of those agreements as are secondary in nature, *i.e.*, those designed to bring pressure upon a neutral employer to force him to aid the union's campaign against the employer with whom the union has a labor dispute...."

contention resurrects the "primary-secondary" dichotomy which has been advocated by boycotting unions and like-minded writers since Taft-Hartley was enacted in 1947 and which has been consistently rejected as an essential criterion of violation in product boycott cases.[19]

The fallacy of the Board's reasoning is that its primary-secondary formula is not an absolute and exclusive criterion of violation. The fact that many of the boycotts referred to in the legislative debates and many of those involved in the cases fit the "primary-secondary" pattern does not mean that *only* those neatly fitting this pattern are proscribed. In drafting the statutory language, Congress deliberately avoided the term "secondary boycott" and, instead, spelled out the specific conduct intended to be proscribed.[20] By using language which specifically banned boycotts against the products of other employers, Section 8(b)(4)(A) (now "(B)") effectuated the congressional intention of reaching many product boycotts which would have been outside the scope of a rigid primary-secondary criterion of violation.[21] There is no valid reason why this rigid and restrictive limitation should be applied to Section 8(e).

The Board's aggrandizement of "work preservation" as a basis of immunity under Section 8(e) disregards the inherent trade restraint and embargo aspects of product boycotts. In so doing, the Board contravenes the balance

19. See NWMA's Brief in No. 110, pp. 35-40.

20. This was explained by Representative Thompson as follows [II Leg. Hist. (1959), p. 1706; 105 Cong. Rec. 16589]:

> "The House and Senate bills contain radically different provisions dealing with activities often brought under the misleading slogan 'secondary boycotts.' The phrase 'secondary boycott' has no exact meaning today. The nature of the differences between the House and Senate bills can only be understood by agreeing upon more exact terminology and talking about specific kinds of activities or contracts."

21. This is demonstrated in NWMA's Brief in No. 110, pp. 29-40.

between the interests of the business economy, on the one hand, and the interests of labor, on the other hand, which is dictated by national policy. This policy was clearly stated by this Court in *Allen Bradley*[22] (applying the antitrust laws) and in *International Rice Milling*[23] (applying the boycott provisions of Taft-Hartley), as follows (325 U. S. at 806):

> "The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other."

By making "work preservation" determinative of immunity under Section 8(e), the Board reverts to the *Hutcheson* case[24] concept that union "self-interest" excuses virtually all forms of economic force, including product boycotts.

However, as we demonstrated in the NWMA Brief in No. 110 (pp. 21-29), it was to remedy this inadequacy of the antitrust laws that Congress enacted the boycott proscriptions of the Taft-Hartley Act. *It is unquestioned that this legislative action was taken to prevent thereafter the employment of product and other secondary boycotts by unions to further their self-interest.* By proscribing product embargo restraints, Congress intended to restore the balance between the interests of the business economy and those of labor, as stated by this Court. As has been consistently held in the antitrust and Taft-Hartley cases, the

---

22. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 806 (1945).

23. *NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 673 n. 7 (1951).

24. *United States* v. *Hutcheson*, 312 U. S. 219 (1941).

embargo restraints of product boycotts are the same, regardless of the form of self-interest motivating the boycotting union (i.e., furthering a jurisdictional fight, obtaining work for unions generally, or obtaining or preserving work for members of a particular union). The same principles apply under Section 8(e), and by focusing solely on union self-interest, the Board fails to accord the necessary recognition and weight to the restraints inherent in product embargoes.

B. Section 8(e), by Its Terms, Proscribes Product Boycott Agreements.

By plain and unequivocal language, Section 8(e) prohibits "*any* contract or agreement, *express or implied*," whereby an employer agrees with a union to refrain from "handling, using, selling, transporting or otherwise dealing in *any of the products* of *any other employer*. . . ." (Emphasis added.) The only exemptions from this broad prohibition are: (1) the limited exemption under Section 8(e) for the construction industry covering "work to be done at the site of the construction"; and (2) the broad exemption for the "apparel and clothing industry" from both Section 8(e) and Section 8(b)(4)(B).

The thrust of the plain and unambiguous language of Section 8(e) is that agreements to boycott the products of other employers are prohibited, and it is fundamental that the statutory language itself is the most relevant guide to its meaning.[25] As it did in the Court below, the Board will undoubtedly try to open the door to "construction" by arguing that the Act cannot be literally applied. This is based on this Court's statement in *International Rice Mil-*

25. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U. S. 93, 100 (1958); Sutherland, *Statutory Construction*, § 4502 (3d ed. 1943); *Packard Motor Car Company* v. *NLRB*, 330 U. S. 485, 492-93 (1947).

ling (341 U. S. 665), and in later cases, that the boycott provisions of the Act do not make it unlawful for pickets at the gates of a struck plant to induce employees of other employers not to enter. But this Court's recognition of that implicit and narrow exception does not give the Board carte blanche authority to depart from the language of the Act and to generate its own product boycott exemption. It is basic that the language of the statute must be followed, except when special circumstances, conclusively demonstrated, compel recognition of an implied exception—and, in such case, the exception must be strictly limited to the special circumstances. There are no circumstances which call for or justify an exemption from the plain language of Section 8(e) of product boycott agreements, such as Rule 17 in this case.

C. Congress Intended Section 8(e) to Reach Agreements to Boycott Products of Other Employers.

There is every reason to believe that Congress intended Section 8(e) to reach product boycott agreements, such as Rule 17 herein. Members of Congress were comprehensively aware of the boycott proscriptions of the Taft-Hartley Act and the course of its enforcement.[26] Under Taft-Hartley, product boycotts of all kinds had been consistently held unlawful. It was the clear purpose of Landrum-Griffin to strengthen, and not to weaken, Taft-Hartley—to close loopholes, and not to open loopholes.

The Board currently contends that, despite the plain language of Section 8(e), the provision should be limited to "hot cargo" agreements, which the Board narrowly defines to be union agreements with a contracting employer to per-

26. Many congressmen who actively participated in the Landrum-Griffin legislative proceedings in 1959 had been equally active during the enactment of Taft-Hartley in 1947. The 1959 Legislative History is replete with references to the earlier act—its weaknesses and the corrective action needed.

mit boycotts against another employer with whom the union has a dispute (Board's Brief, pp. 22-26). This rigidly narrow construction of Section 8(e) is wrong and is based upon a misinterpretation of the legislative history.

The basis on which the Board seeks to justify its departure from the plain language of Section 8(e) is that, during congressional considerations of this legislation, frequent references were made to certain "hot cargo" agreements whereby so-called "secondary" employers agreed to boycott "primary" employers with whom the union had disputes. The Board argues from this that Congress intended to reach only this limited form of boycott agreement. However, the legislative record reveals that the references to "hot cargo" were illustrative of one form of boycott agreement which had been extensively used by the Teamsters Union, but were not intended as dictating a narrow limitation on the broad proscriptions of Section 8(e). On the contrary, proponents took precautions to assure that Section 8(e) would invalidate agreements to boycott the products of others, even when the union did not have a dispute with any so-called "primary" employer, and this was understood by opponents.

The background of the legislative situation in 1959 reveals the problems confronting the proponents of the amendments to Taft-Hartley and the reasons for the legislative action taken. Although the Taft-Hartley Act in 1947 was intended to strike broadly at product boycotts and other forms of secondary boycotts, union advocates had succeeded in opening several loopholes which severely limited the proscriptions of what was then Section 8(b)(4)(A).[27] A

27. Representative Rhodes explained [II Leg. Hist. (1959), p. 1580; 105 Cong. Rec. 15544]:

"When Congress passed the Taft-Hartley Act in 1947 the debates in both Houses make it clear that the managers of the bill intended to prohibit every type of secondary boycott. Unfortunately, the language used in section 8(b) (4) of the

major loophole was the fact that, as long as a union did not "induce" employees, it was free to accomplish boycotts by coercion of employers. Another weakness was that inducement of "individual" employee action (as distinguished from "concerted" action) was not prohibited. There was also the loophole that the Act did not prohibit boycott action against carriers and others not within the statutory definition of "employer."

In addition, this Court revealed a weakness of the Act in its *Sand Door* decision[28] in 1958, wherein it was held that an employer-union agreement to boycott the products of other employers was not a justification of boycott action under Section 8(b)(4)(A)(now "B"), but that the agreement itself was lawful. This was a serious weakness, and Congress concluded that the mere existence of such agreements (although enforceable only by means other than economic action) had boycott effects like consummated boycotts, and that they, too, should be outlawed as against public policy. Congress intended by 8(e) to outlaw agreements to permit boycotts which, if consummated by economic force, would violate Section 8(b)(4)(B)—i.e., except for the provisos of 8(e), the scope of the complementary provisions was intended to be the same.

By the time the Eighty-Sixth Congress convened in January, 1959, much pressure had developed nationally to close the loopholes and strengthen the boycott provisions of Taft-Hartley. However, this problem was overshadowed by the shocking revelations of union corruption (particularly in the Teamsters Union) disclosed by the 1957-58

---

act did not accomplish this purpose. Ingenious union counsel have uncovered so many loopholes that the act in practice failed to accomplish its objective."

Similarly, see Senator Kennedy's report on the Conference Bill. II Leg. Hist. (1959), p. 1431; 105 Cong. Rec. 17898.

28. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U. S. 93 (1958).

hearings of Senator McClellan's select committee. Thus, the prevailing congressional sentiment at the beginning of the session was that labor reform should have first priority, and that Taft-Hartley corrective action should be deferred for separate (and undoubtedly later) legislative action.

Therefore, the strategic objectives of the proponents of the amendments to Taft-Hartley (herein the "proponents") were: (1) To get the amendments included with labor reform in the same statutory package; (2) to plug the specific loopholes in 8(b)(4)(A); and (3) to strengthen the boycott provisions of the Act by enacting complementary counterpart sanctions against boycott agreements. Colloquially stated, to accomplish these objectives the proponents needed a "whipping boy" and a slogan. These became the Teamsters Union and "hot cargo."[29] However, from the beginning the proponents had safely secured in their own bills broad proscriptions against boycott agreements which were eventually embodied in Section 8(e),[30] and the following review of the legislative history reveals that the proponents intended, and the opponents understood and eventually accepted, the broad proscriptions which emerged in Section 8(e).

The course of relevant legislative action began in the Senate with the introduction of the Kennedy-Ervin Bill

29. Senator Morse stated this precisely [II Leg. Hist. (1959), p. 1428; 105 Cong. Rec. 17884]:

> "'Hot cargo' is, in truth, an epithet applied to a provision in a labor-management agreement typical of the trucking industry. The Senate, because the 'hot cargo' agreement had seemed to be abused, and because the Teamsters had shown up in the McClellan hearings as the union which had most clearly ignored its obligations to its employees and to the public, passed a bill making it illegal in the trucking industry to sign a 'hot cargo' provision. . . ."

In like vein, see II Leg. Hist. (1959), p. 1242; 105 Cong. Rec. 6730 (Senator Smathers).

30. I Leg. Hist. (1959), pp. 142, 255, 681, 942.

(S. 505)[31] on January 20, 1959, where it continued until April 29,[32] when this bill, as amended, went to the House as S. 1555. Action continued in the House until August 14, when the House Landrum-Griffin Bill[33] (H. R. 8400, which by substitutions became S. 1555) went to Senate-House conference.[34] The ensuing Conference Report was adopted by the Senate on September 3 and by the House on September 4, and the Act was approved by the President on September 14, 1959.

The Kennedy-Ervin Bill, reported out of committee as S. 1555 on April 14, contained only "reform" measures and no amendments to Taft-Hartley. The Kennedy forces strongly opposed the inclusion of the amendments and, to defer action, the Senate Committee appointed a panel of experts to study the subject and report later.[35]

Using the Teamsters Union's abuse of its "hot cargo" boycott agreements as an opening wedge, the proponents finally succeeded in opening the Senate reform legislation "package" to Taft-Hartley amendments. On April 22, the Senate accepted Senator Gore's amendment to the Committee Bill (S. 1555).[36] This amendment was strictly limited to boycott agreements in the transportation industry and was described by Senator Gore as follows[37] [II Leg. Hist. (1959), p. 1163; 105 Cong. Rec. 6557]:

---

31. I Leg. Hist. (1959), p. 29.

32. II Leg. Hist. (1959), p. 1481; 105 Cong. Rec. 7106. All dates herein are in the year 1959, unless otherwise stated.

33. I Leg. Hist. (1959), p. 619.

34. II Leg. Hist. (1959), p. 1702; 105 Cong. Rec. 15892.

35. S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 5; I Leg. Hist. (1959), p. 401.

36. II Leg. Hist. (1959), pp. 1161-63; 105 Cong. Rec. 6656-57.

37. Senator Kennedy accepted the Gore amendment because it would "outlaw the so-called hot cargo agreement, which has been one of the means by which the Teamsters' Union has expanded its power." II Leg. Hist. (1959), p. 1162; 105 Cong. Rec. 6556.

"The purpose of the amendment is to declare and make it 'an unfair labor practice for any labor organization and any employer who is a common carrier subject to part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, or transporting any of the products of any other employer, or to cease doing, or refrain from doing, business with same.'"

Having opened the door, on April 24 the proponents tried to broaden the proscriptions against boycott agreements. Senator McClellan proposed a new Section 607 to S. 1555 proscribing, *inter alia*, union pressure to obtain boycott agreements with any employer in any industry.[38] This amendment failed and the proponents were unsuccessful in their effort to broaden the sanctions against boycott agreements in the Senate.[39] However, Senators Goldwater and Dirksen, in their statement of the minority view, strongly opposed S. 1555 because of its inadequacies. They stated that Senator Goldwater's bill (S. 748), *inter alia*, would effectively deal with boycott agreements:[40]

"(2) *Hot-cargo clauses.*—It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call *'hot goods,' 'unfair materials,'* and *'blacklisted products.'* . . ."

• • • • •

"S. 748 makes it an unfair labor practice for a union to coerce an employer to enter into such an agreement, or having entered into it, for a union to

38. II Leg. Hist. (1959), pp. 1193-98; 105 Cong. Rec. 6666-71.

39. Senator Kennedy opposed the McClellan amendment because of his desire to protect restrictions against a manufacturer's subcontracting work to any contractors who do not pay a "standard" wage. II Leg. Hist. (1959), pp. 1195-96; 105 Cong. Rec. 6668-69.

40. S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., pp. 79, 80; I Leg. Hist. (1959), pp. 475, 476.

> coerce the employer to live up to it, or to induce his employees to take economic action to force the employer to live up to it. Only the latter is now unlawful under the Taft-Hartley Act." (Emphasis added.)

This comment concerning S. 748 reflects the clear objectives of the proponents regarding the scope of the intended proscriptions against boycott agreements. Beginning with the Goldwater Bill in the Senate (S. 748, introduced January 28) and Representative Kearns' counterpart bill in the House (H. R. 3540, introduced January 29), *every complete bill introduced by the proponents through the entire period provided in Section 8(b)(4)(B) itself that an agreement to boycott was one of the proscribed objectives.*[41] Being a part of 8(b)(4)(B), the intended scope and application of this proscription against agreements to boycott was necessarily the same. This provision was maintained on all the proponents' bills, including the Landrum-Griffin Bill (which eventually became the law), until the proponents were satisfied that the intended scope of the proscription against boycott agreements was fully covered by Section 8(e) and Section 8(b)(4)(A). The House Report on the final agreed conference bill stated:[42]

> "The conference committee adopted the provisions of the House amendment with the following changes: (1) the phrase 'or agree to cease' was deleted from section 8(b)(4)(B) because the committee of conference concluded that *the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into 'hot cargo' agreements,* and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language; . . ." (Emphasis added.)

---

41. ". . . *or to agree* to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . ." I Leg. Hist. (1959), pp. 142 (S. 748), 255 (H. R. 4474), 328 (S. 1384), 595 (H. R. 7265), 681 (H. R. 8400).

42. H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 38; I Leg. Hist. (1959), p. 942.

The Elliott Bill (H. R. 8342), counterpart of the Kennedy-Ervin Bill, which was introduced in the House on July 23,[43] prohibited boycott agreements only to the same limited extent as did S. 1555—i.e., "hot cargo" agreements in the transportation industry. The Landrum-Griffin Bill (H. R. 8400), sponsored by the proponents and introduced on July 24,[44] contained the provisions of Section 8(e) (substantially the same as later enacted, except for the provisos) broadly forbidding any union and any employer *to enter into any agreement, express or implied, whereby the employer ceases or refrains from handling the products of any other employer* or ceases doing business with any other person. The proponents prevailed in the House, and the Landrum-Griffin Bill (which, after substitutions, became S. 1555) was sent to the Senate-House conference on August 14 [II Leg. Hist. (1959), p. 1702; 105 Cong. Rec. 15892].

The Conference Committee agreed on the Landrum-Griffin language of 8(e) after adding the limited construction industry proviso exempting from Section 8(e) agreements "relating to the contracting or subcontracting of work to be done at the site of the construction" and the garment industry proviso broadly exempting that industry from Sections 8(e) and 8(b)(4)(B). The Committee also added Section 8(b)(4)(A), which proscribed economic pressure by unions to obtain boycott agreements—and this had the same effect as the "to agree" language previously included in the Section 8(b)(4)(B) provisions of Landrum-Griffin and other proponents' bills (*supra*, p. 25). As stated, the Senate agreed to the bill on September 3 and the House on September 4, and it was signed by the President on September 14.

---

43. I Leg. Hist. (1959), p. 755; II Leg. Hist. (1959), p. 1517; 105 Cong. Rec. 14177.

44. I Leg. Hist. (1959), p. 683; II Leg. Hist. (1959), p. 1527; 105 Cong. Rec. 14381.

The end result was that, in Section 8(e) and Section 8(b)(4)(A), the proponents got the broad proscriptions against boycott agreements which they had sought from the beginning, and the opponents saved therefrom only the exceptions in the provisos of Section 8(e). Members of Congress were fully aware of all this.

As a dominant participant in the legislative proceedings, Senator Kennedy's statements carried weight and revealed that he understood the broad thrust of Section 8(e). He opposed Senator McClellan's unsuccessful attempt on April 24 to write the boycott-agreement proscription into Section 8(b)(4)(B) on the ground that it would prevent work-standard subcontracting restrictions —particularly in the garment industry [II Leg. Hist. (1959), p. 1195; 105 Cong. Rec. 6668]. On August 20, while the Landrum-Griffin Bill was in conference, Senator Kennedy and Representative Thompson published an analysis of the scope and thrust of the Landrum-Griffin Section 8(e), in which they said: "Apparently this section would forbid an employer (such as a clothing store) from agreeing to a union's request that he stop doing business with another person (such as the clothing manufacturer) . . ." [II Leg. Hist. (1959), p. 1707; 105 Cong. Rec. 16590]. Again criticizing the effect of Section 8(e) on restrictive work standard clauses in the garment industry, the Senators said: "*The House bill (sec. 705(e)) outlaws these clauses. There is no other way in which the language can be interpreted,* for it unequivocally outlaws any contract between an employer and a union 'whereby such employer * * * (i.e., the jobber) * * * *agrees to refrain from* * * * *doing business with any other person* (i.e., an unapproved contractor)." (Emphasis added.) They said that restrictions on contracting to protect employees against loss of jobs "appear to be outlawed by the House bill." [II Leg. Hist.(1959), p. 1708; 105 Cong. Rec. 16590].

On August 28, in the course of seeking Senate instructions concerning the bill in conference, Senator Kennedy stated concerning his proposed changes[45] [II Leg. Hist. (1959), p. 1377; 105 Cong. Rec. 17327]:

> "On the second point, we accept the broad language of the House bill with respect to secondary boycotts. But we insist on a few wholly reasonable and necessary limitations. First, restrictions upon subcontracting which are absolutely essential to stabilizing wages in such industries as the garment industry are not forbidden. In that industry while production is carried out by subcontractors, it is highly integrated and the *unions customarily have utilized clauses in their contracts to insure against subcontracting to substandard sweatshops.* . . . To accept the House provisions without the limitations which we have suggested would be to invite chaos in this industry." (Emphasis added.)

And again in reporting on the final conference agreement, Senator Kennedy explained that only by the adoption of the provisos had it been possible to save from Section 8(e) the exempted restrictions on subcontracting [II Leg. Hist. (1959), p. 1432; 105 Cong. Rec. 17899]:

> "Fourth. Hot cargo: The Landrum-Griffin bill extended the 'hot cargo' provisions of the Senate bill, which we applied only to Teamsters, *to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern.* The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. *Both changes were necessary to avoid serious damages to the pattern of collective bargaining in these industries.*" (Emphasis added.)

Representative Thompson agreed with Senator Kennedy that "Section 705 of the Landrum bill would invalidate the

45. Although he clearly understood the sweeping reach of Section 8(e), Senator Kennedy did not seek to justify or to exempt boycotts of prefabricated products.

subcontracting clauses which have proved essential to stabilizing the garment industry." He also stated that the bill would prevent restrictions upon subcontracting by companies and unions to prevent the loss of jobs [II Leg. Hist. (1959), p. 1576; 105 Cong. Rec. 15440]. In supporting the agreed conference bill, Representative Thompson described 8(e) proper as follows [II Leg. Hist. (1959), p. 1721; 105 Cong. Rec. 18134]:

> "The Landrum-Griffin bill extended the hot cargo provisions of the Senate bill *to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. . . .*" (Emphasis added.)

Congressman Roosevelt agreed that Section 8(e) would outlaw restrictions on subcontracting of work *to preserve wage standards* and prevent the purchase of nonunion uniforms or materials [II Leg. Hist (1959), p. 1593; 105 Cong. Rec. 15557].

Senator Morse, in a comprehensive analysis of the agreed Conference Bill, on September 3 clearly stated the proscriptions of 8(e) as follows[46] [II Leg. Hist. (1959), p. 1428; 105 Cong. Rec. 17884]:

> "The House bill, and now the conference report, have made it an unfair labor practice for any employer and a union to include in their agreement, a provision which imposes any conditions upon doing business with another employer.
>
> "The bill makes it illegal for a union and an employer 'to enter into any contract or agreement, express or implied, whereby such employer' ceases or *agrees to cease to do business with another employer or person. . . .*"
>
> • • • • •

46. This was an objective analysis made after conference agreement had been reached and after it was known that the bill would pass. Only Senators Morse and Langer voted against the bill. II Leg. Hist. (1959), p. 1453.

"The far-reaching effect of this proposal is something on which there are no hearings. The conferees, and certainly no member of this body, have any idea how many labor agreements contain such provisions. Examples that come to my mind which would be banned by these provisions are as follows:

"First. It would prevent a union from protecting the bargaining unit it represents by obtaining an *agreement not to subcontract work normally performed by employees in the unit.*

• • • • •

"Fifth. The agreement between the major coal producers and the mineworkers, pursuant to which the coal mine companies buy low-wage mined coal from substandard mines and sell it along with their own product would be banned.

"The distinguished Senator from West Virginia [Mr. Randolph] fought very hard to get this agreement covered by way of an exemption in the bill." (Emphasis added.)

The proponents of 8(e) clearly intended and the opponents clearly recognized[47] that the sweep of 8(e) reached beyond the narrow scope to which the Board now seeks to limit it. In 1959 product boycotts were not in the controversial limelight, as they had been in 1947, and there

47. As it did in the Court below, the Board may argue that opponents of legislation tend to overstate results, and that their comments should be given little weight. That is not a valid contention here. The quoted comments were not "scare" tactics employed in the heat of debate. Senators Kennedy and Morse and Representative Thompson were dominant participants in the legislative contest. For the most part, their comments were from carefully prepared analyses of the legislation and are consistent with the statements they made after conference agreement was reached and enactment assured. Further, it is not only the subjective intent of leading spokesmen that is relevant, but also the reliance on their statements by other congressmen which is significant. Moreover, it is likely that proponents tend to understate as much as opponents overstate, and if both were to be discredited for that reason, little weight could be accorded any legislative debate.

is little reference to them. Since 1947 the Board and the courts had consistently enforced the Act against product boycotts, and the only problems calling for discussion in 1959 were the various loopholes and boycott-agreement immunities which had application to secondary boycotts generally. *It is hardly conceivable that either proponents or opponents had any idea that, during the arduous course of strengthening the Taft-Hartley Act, Congress was unwittingly granting unions a new broad product-boycott immunity—as the Board now contends.*

On the contrary, Congress intended to continue its stand against union product boycotts, which it had banned in 1947. Senator Curtis, explaining the general loophole-closing objectives of S. 748 (which included proscriptions against boycott agreements), on January 28, stated [II Leg. Hist. (1959), p. 989; 105 Cong. Rec. 1296]:

> "Mr. President, I am pleased to note that the Goldwater bill, of which I am a cosponsor, contains provisions to amend and make more effective the secondary boycott provisions of the Taft-Hartley Act.
>
> "The legislative history of the Taft-Hartley Act indicates that the Congress assumed that its secondary boycott provisions would effectively restrict union action, first, to compel an employer to stop using products made by nonunion employees or members of another union, second, *to prevent the use of new labor-saving devices or processes,* third, *to exclude competing goods from an area,* or fourth, to force an employer to assign work to members of one union rather than another. The experience of the last 11 years, however, has shown that certain methods exist whereby unions may still make effective use of the secondary boycott." (Emphasis added.)

Senator McClellan, on April 20, stated [II Leg. Hist. (1959), p. 1052; 105 Cong. Rec. 6290]:

> "Then I propose to offer an amendment relating to

> the secondary boycott, to strengthen the law so as to prevent any union official from saying to a customer of a manufacturer a thousand miles away from the scene of the dispute, *'You can no longer handle the products of that manufacturer,'* and place a picket line around his establishment. It would prevent any union official from saying to such a businessman, *'If you handle the products of a certain manufacturer,* we will picket your place and shut off your supplies, and embarrass customers who come here to deal with you.' " (Emphasis added.)

Representative Rhodes, on August 5, criticized the narrow scope of the "hot cargo" provision of the Elliott Bill, stating [II Leg. Hist. (1959), p. 1543; 105 Cong. Rec. 15195]:

> "The gentleman from New Jersey knows that this is only a part of the hot cargo situation. In the hot cargo situation, as I understand it, a classical case would be where a union signed a contract with an employer stating that if the union so advised the employer, that the employer would not make his employees work on *material from a plant which, for some reason, the union has blacklisted."* (Emphasis added.)

Later, Representative Rhodes, urging the need for the boycott-agreement provisions of the Landrum-Griffin Bill to "accomplish a much needed reform," specifically referred to boycotts of prefabricated products as one of three types of boycott agreements to be proscribed, stating [II Leg. Hist. (1959), p. 1581; 105 Cong. Rec. 15545]:

> "At the present time not only do most Teamster contracts contain such clauses but various building and printing trade unions have insisted on *contracts under which employees are excused from handling certain prefabricated products,* products which do not bear the label of a particular union, or products manufactured by a company dealing with some other union. *Were it not for the immunity granted labor organiza-*

tions from the antitrust laws the courts would undoubtedly have invalidated such contracts as being flagrant restraints of trade." (Emphasis added.)

Significantly also, Representative Thompson, unsuccessfully urging adoption of a common situs amendment, conceded the continuing unlawfulness of the boycott of prefabricated products[48] [II Leg. Hist. (1959), p. 1577; 105 Cong. Rec. 15541]:

"'All true secondary boycotts in the construction industry would continue to be unlawful, such as *the refusal to erect prefabricated houses* or to work on nonunion goods.'" (Emphasis added.)

---

48. It cannot be seriously questioned that both proponents and opponents recognized the inherent evil of product embargoes. Neither in 1947 nor in 1959 did any congressman try to justify restraints such as Rule 17 herein or to suggest that such boycotts were not clearly outlawed. See illustrations referred to in NWMA's Brief in No. 110, pp. 32-33.

Senator McClellan commented on the unconscionable nature of prefabrication boycotts in his 1962 book, *Crime Without Punishment*. In the chapter entitled "Manifold Blessings," he reported (pp. 263, 264):

"This official, Ewell H. Hodge, former Air Force contracting officer, testified to the almost incredible account of 'blessing the manifold.' This tale should be recounted, for it typified the kind of outrageous nonsense that filled the record during these missile base hearings.

"Mr. Hodge described the manifold in question, which is an assembly of pipes and valves used in the hydraulic systems on an ICBM launching pad. When the manifolds arrived from the factory for installation, the union pipefitters claimed that they should have assembled the manifold, since the device contained pipes with diameters less than two inches. The pipefitters insisted on disassembling, cleaning, and then reassembling the manifolds, a completely pointless procedure.

"It was later decided that it was unwise to take the manifolds apart. It might harm them. So a ritual that became known as 'blessing the manifolds' was initiated. It involved absolutely no work at all. The workers were paid for doing nothing."

• • • • •

"Sometimes the blessing ran into overtime, and not infrequently it was paid for at double time rates."

Finally, if more were needed to show that Congress intended to continue its ban against product boycotts, it would be difficult to find more compelling evidence than the proviso of Section 8(e) itself. This proviso and the explanations and assurances regarding it show how careful all those concerned were to avoid any indication that jobsite unions could boycott products made by other employers elsewhere.[49]

Reporting for the House Committee in conference, Representative Barden, on September 4, explained [II Leg. Hist. (1959), p. 1715; 105 Cong. Rec. 18128]:

> "The first proviso under subsection (e) of section 704 permits the making of voluntary agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work *to be done directly on the site of construction.*" (Emphasis added.)

The House Report on the conference specifically stated the exclusion of products made away from the site:[50]

> "It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements *relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction. . . .*" (Emphasis added.)

The same point was emphasized more completely by Senator Kennedy's Report on the conference agreement [II Leg. Hist. (1959), p. 1433; 105 Cong. Rec. 17900]:

> "It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of work

49. The Court below expressly referred to this feature of Section 8(e) in its finding of violation (R. 166).

50. H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39: I Leg. Hist. (1959), p. 943.

to be done at the site of the construction.' *The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.*" (Emphasis added.)

The meticulous care with which the conferees pointed out that products made off-site were not within the proviso shows their belief that Section 8(e) proper proscribes agreements to boycott such products. If this were not so, the assurances that boycotts of off-site products were not saved by the proviso would have been meaningless.[51]

Therefore, we submit that the legislative record does not warrant or justify the deviation from the plain language of Section 8(e) which the Board seeks to make in this case. On the contrary, the record reveals a clear intention that 8(e) forbids jobsite boycott agreements to boycott products manufactured elsewhere.

---

51. In the Court below, the Board tried to answer this compelling evidence of legislative intent by suggesting that the conferees were probably talking about a special kind of off-site products—namely, those manufactured by an employer with whom the jobsite union had a dispute. This strained rationalization suggests the burden of necessity. The suggestion is incredible! Had the actuality or possibility of such a limitation been even remotely in the minds of the conferees, they would have so stated in the proviso itself and in their explanations of it. We think the answer is inescapable that neither the conferees nor any other congressman had the slightest conception that, at some later date, the Board would be contending that jobsite contracts to boycott products of other employers manufactured elsewhere are immune from the proscriptions of Section 8(e). Senator Kennedy's astute solicitude for union interests was so frequently demonstrated during the debates and in the concessions he obtained in the final conference that it is inconceivable that he would not have included a "primary dispute" limitation in the proviso and in his explanation of it if there had been any such thought in his mind.

D. Section 8(e) Should Be Construed Consistently With Section 8(b)(4)(B).

Section 8(e) and Section 8(b)(4)(B) are about as close *in pari materia* as two statutory provisions could be. As we have seen, Section 8(e) was intended to complement Section 8(b)(4)(B) by prohibiting agreements to permit or carry out boycotts which, if consummated, would violate Section 8(b)(4)(B). Thus, Section 8(e) was explained by proponents as intended to prohibit what is in effect a "secondary boycott in futuro"—that is, an "agreement by an employer to permit a secondary boycott to be carried on against him."[52]

The language of Section 8(e) was virtually lifted from Section 8(b)(4)(B) and, as previously stated, the proscriptions against boycott agreements, which had been in that section in all proponents' bills during the legislative proceedings, were deleted only after it was certain that Sections 8(e) and 8(b)(4)(A) had equally broad coverage.[53] The Board has conceded that these complementary provisions have comparable scope. In *Cardinal Industries*,[54] it was stated (pp. 985, 987):

> "As was aptly expressed by Senator Goldwater, Section 8(e) was intended to outlaw what is in effect a

---

52. II Leg. Hist. (1959), p. 1829.

53. Except for the provisos, of course. See, *supra*, p. 25.

54. *Ohio Valley Carpenters District Council, etc. (Cardinal Industries, Inc.)*, 136 NLRB 977 (1962). Professor St. Antoine, when assistant to the AFL-CIO General Counsel, viewed the two sections in the same way [St. Antoine, *Secondary Boycotts and Hot Car): A Study in Balance of Power*, 40 U. Det. L. J. 189, 206-07 (1962)]:

> "When an agreement is brought into question under Section 8(e) * * * the test generally should be whether a union would violate the secondary boycott ban of section 8(b)(4)(B) by inducing employee conduct of the type authorized by the agreement, or by inducing employees to make their employer do what he has committed himself to in the agreement. If the inducement would be a violation of section 8(b)(4)(B), the agreement should be held a violation of section 8(e)."

'secondary boycott in futuro,' that is, 'an agreement by an employer to permit a secondary boycott to be conducted against him.' II Leg. Hist. 1859 [1829] (1959). It must be interpreted and applied with that in mind."

• • • • •

"The principles established in 8(b)(4) cases, though not necessarily controlling, *nevertheless provide persuasive guidance to any interpretation of 8(e).* As stated above, 8(e) was designed to outlaw agreements under which an employer agrees in advance to permit unlawful secondary boycotts to be conducted against him. It is quite evident therefore that Congress intended 8(e) and 8(b)(4)(B) to be construed in harmony. Thus, generally speaking, the validity of a restrictive agreement challenged under 8(e) must be considered in terms of whether that agreement, if enforced by prohibited means, would result in an unfair labor practice under Section 8(b)(4)(B). *Clearly, there is little point and no logic in declaring an agreement lawful under 8(e), but in finding its enforcement condemned under 8(b)(4)(B), and the converse is of course equally true. . . .*" (Emphasis added.)

It is apparent, therefore, that Section 8(e) should be construed consistently with Section 8(b)(4)(B), and that decisions thereunder should be accorded compelling weight in determining the scope and application of Section 8(e).

These decisions clearly establish that, given a proscribed objective of banning the products of another employer, (1) an objective of work preservation by the boycotting union is not a defense; and (2) the absence of a labor dispute with the manufacturer of the boycotted product is not a defense.

These cases, which are discussed in NWMA's Brief in No. 110 (pp. 35-41), are summarized in part here.

The product boycott concepts of Section 8(b)(4)(B) are

grounded on *Allen Bradley.*[55] There a prime union motivation was work preservation (even to the point of absolute union work monopoly, comparable to that which was sought by Rule 17 herein). Further, the boycotting union had no disputes with the national manufacturers involved, nor any concern with their union status or working conditions. Yet this product boycott condition was named by legislators a "prime target" of Section 8(b)(4)(B) (then "(A)") during the course of its enactment in 1947.

In *Sound Shingle,*[56] the boycotting union apparently was motivated by a desire to preserve work for its own union and possibly its sister unions. However, it had no dispute whatever with any of the manufacturers. The Ninth Circuit specifically pointed out that, when the union's objective was to boycott the products made by someone else, *the absence of a dispute with any manufacturer was immaterial* (p. 152):

> "The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. *If that were true, it would not make the Union's conduct any more excusable.* The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' That is a prohibited object whether the union has or has not a dispute with such 'other producer, processor, or manufacturer.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, *the conduct would appear even more reprehensible.* * * *" (Emphasis added.)

---

55. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945). See NWMA's Brief in No. 110, pp. 29-35.

56. *NLRB* v. *Washington-Oregon S. W. D. C.*, 211 F. 2d 149 (9th Cir. 1954), affirming 101 NLRB 1159 (1952).

Joliet Contractors,[57] which was the product boycott counterpart of the *Allen Bradley* case and the present case, was concerned with a Glaziers Union boycott of prefabricated windows known as "preglazed sash." The union's objective was the preservation of jobsite glazing work ("all glazing must be done on the jobsite"), and there was no dispute with any manufacturer, nor was the union in the slightest concerned with working conditions at any manufacturer's plant. Emphasizing that the union's boycott objective was proscribed, the Seventh Circuit said (202 F. 2d at p. 610):

> "Both the Board and the Union, so we think, *place too much emphasis upon the contention that the activities of the Union and its members were primary* and, therefore, permissible under the Act. Closely allied with this contention is the argument that the Union was engaged in the rightful endeavor *to obtain more work* for its members by preventing the use of preglazed sash on the job. . . . Whatever merit there may be in the premise upon which this argument is predicated, the fact remains that *the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course.* Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon *whether its activities are primary or secondary. . . .*" (Emphasis added.)

Refusing to get involved in legal semantics as to who was "primary" and who was "secondary," the Court emphasized that the controlling criterion was that the union's target was preglazed sash.

Similarly, in *General Millwork*,[58] the Sixth Circuit held

57. *Joliet Contractors Association* v. *NLRB*, 193 F. 2d 833 (7th Cir. 1952); *idem*, 202 F. 2d 606 (7th Cir. 1953), cert. denied, 346 U. S. 824 (1953).

58. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957), enforcing 113 NLRB 1084 (1955).

illegal a Carpenters Union work-preservation boycott against prehung doors (such as are barred by Rule 17 herein). The union had no dispute with the manufacturers and was not concerned with their working conditions. Finding that the union's boycott of prehung doors was in itself a proscribed objective, Judge Stewart (now Justice Stewart), speaking for the Court, pointed out that (pp. 934-35):

> "The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b)(4)(A) of the Act, which *neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. N. L. R. B.* v. *Washington-Oregon Shingle Weavers' Dist. Council,* 9 Cir., 1954, 211 F. 2d 149, 152-153." (Emphasis added.)

In *York Corporation,*[59] the Board found illegal a Sheet Metal Workers Union's work-preservation boycott of prefabricated metal boxes and completely rejected the "primary-secondary" dichotomy urged by the union, stating (p. 685):

> "The foregoing authorities established that in a situation of the present type, *it is unnecessary to assign the usual labels, 'primary' and 'secondary,' among the various contractors and subcontractors* whose business relationships were being disrupted by the boycott activity. The fact that the evidence showed that the only dispute was with Limbach and that no demands were made upon York is, therefore, immaterial. For *since the Union's object was a proscribed one,* the terms of the statute make immaterial the nature of the dispute, *or even that a dispute exists with a specific primary employer. . . .*" (Emphasis added.)

Following the Landrum-Griffin Amendments, the Board adhered to this principle that, given a product boycott ob-

59. *Clifton Deangulo (York Corporation),* 121 NLRB 676 (1958).

jective, the absence of a primary dispute and the existence of a work-preservation objective were not material.[60] Significantly, in seeking affirmance in its findings of 8(b)(4)(B) violations,[61] the Board told the Court below that the Union's contention that "an active dispute between a union and an employer is required . . . ignores controlling precedents. . . ." Referring to *General Millwork* (*supra*,

60. Holding unlawful a work-preservation boycott by the Electrical Workers against prefabricated cables, the Board, in *Local 756, Int'l Brotherhood of Electrical, etc. (The Martin Company)*, 131 NLRB 1010, 1018 (1961), stated:

> "It matters not that the result sought by the Union might ultimately redound to the benefit of subcontractors such as Gable and increase their business by requiring Martin to give to its subcontractors the additional work of fabricating cables. Even assuming that such a result would be reached, *there is nothing in the Act which would permit the conclusion that an ultimate end not violative of the Act justifies a means which does violate the Act*, particularly when the immediate object of the means is proscribed by the Act in precise terms.
>
> ". . . *I have no hesitation in considering the cables prefabricated by Martin to be 'products of Martin,'* and, since I have found that the record discloses that the Union inspired the refusal by Gable's employees to install the prefabricated cables, it follows that the object, contrary to this contention, was to force Gable to cease handling the prefabricated cables, albeit that was not its ultimate object. *This case falls within the category of 'product boycott' cases which have been held to be violative* of the Act, such as *Sound Shingle Co.*, . . ." (Emphasis added.)

Similarly, striking down a Plumbers Union's work-preservation boycott against prefabricated tunnel pipe hangers, the Board, in *Local 598 Plumbers & Steamfitters (MacDonald-Scott & Associates)*, 131 NLRB 787, 800 (1961), stated:

> "To say that the object of the Respondents was to induce or compel Scott Company *to assign the work of installing* the disputed supports to the Respondents' members in conformity to the U. A. form contract and not to force Scott Company to cease using Eaton's product or to cease doing business with Eaton is, on the facts here presented, to pretend that the latter object is not a necessary consequence of the former object. The two objects are inseparable. *It is immaterial that one objective might be legal if the other is illegal.*" (Emphasis added.)

61. Board's Reply Brief in the Seventh Circuit Court of Appeals, No. 15064, pp. 14-16.

p. 39), *Sound Shingle* (*supra,* p. 38), and related cases, the Board concluded: "These authorities establish, we submit, that neither an active dispute nor 'contact' between a union and a primary employer is essential to a finding . . ." of violation.

E. The Board's Narrow Application of Section 8(e) Would Create a Double Standard in Product Boycott Law.

This anomalous situation would result from the fact that work preservation, which has never been held to be a defense under Section 8(b)(4)(B), *ipse dixit* becomes a defense under Section 8(e).

This double standard contradicts and frustrates the demonstrated legislative objective that Section 8(e) would complement Section 8(b)(4)(B) by outlawing agreements to permit boycotts in the future (*supra,* pp. 36-37)—and thereby correct the weakness revealed in *Sand Door* (*supra,* p. 21). It would have the extraordinary result that identical product boycotts would be lawful if enforced by litigation or threats of litigation under Section 8(e) agreements, but would be unlawful if the same agreements are enforced by inducement of employees or coercion of employers under Section 8(b)(4)(B). This anomalous state of affairs is illustrated by the Board's decision below. The Board found that the Union's enforcement of Rule 17 on the Driscoll, McDonnell and Nason jobs was unlawful because the objective was the manufacturers and distributors of the boycotted doors; yet it found that the same Rule 17 was lawful under 8(e) on the ground that its objective was only work-preservation. Thus, the Board takes the incredible position that Rule 17 had a proscribed objective when enforced by economic action, but a valid objective when not so enforced.

Thus, we submit that the Board's decision on Section 8(e) below is erroneous as a matter of law because it accords

controlling weight to the factor of work preservation,[62] excludes from consideration the criterion of boycott objective, and would create an inconsistent double standard of construction of Sections 8(b)(4)(B) and 8(e), contrary to the statutory and legislative intent. It would open a wide and unintended loophole of contractual boycott immunity for unions in the construction and other industries.

F. The Work-Assignment and Subcontracting Cases Relied on by the Board Are Not Properly Applicable to the Product Boycott Proscriptions of Rule 17 Herein.

As it did in the proceedings below, the Board here (Board's Brief, pp. 25-27) seeks to bring Rule 17 within the protection of its work-assignment and subcontracting cases. The Court below correctly rejected this contention.

In these cases the Board, with some court support (principally the Court of Appeals for the District of Columbia) has treated "work preservation" as a controlling criterion in the application of Section 8(e). In so doing, the Board has departed far from its earlier argument (Board's Brief, pp. 13-24) that the legislative history requires that 8(e) must be narrowly applied only to boycott agreements with a "secondary" employer in furtherance of the union's dispute with a so-called "primary" employer. In these cases the Board does not require that there be a so-called "primary" dispute with any particular employer or with any other employer at all. Rather, the Board currently applies Section 8(e) if the contractual restriction on the assignment of work is deemed in some way to affect working conditions or employment relations outside the work

62. In this connection, we point out that, in the entire Landrum-Griffin legislative history, the only references to union work-preservation agreements were those on which the consensus of both proponents and opponents was that they would be proscribed by Section 8(e) if they were not exempted (i.e., the garment and construction industries provisos).

unit of the contracting employer.[63] The Board's employment of work preservation as the controlling test of violation has led to the extraordinary position that restrictions banning *all* subcontracting of work are lawful under Section 8(e), whereas conditional restrictions (which have far less "restraint" effects) are unlawful.

The cases in which these subcontracting rules developed involved the subcontracting of services or the assignment of work, as such. Further, the assignments, for the most part, involved work performed in, or directly connected with, the contracting employer's operation or the union's jurisdiction.[64]

These work-assignment subcontracting cases cannot properly be applied to justify the product boycott dictated by Rule 17 in the instant case. We have here a *purchase*

---

63. We respectfully submit that the Board's own subcontracting rationale completely answers its earlier contention that Congress intended Section 8(e) to be limited by a rigid "primary dispute-secondary pressure" formula.

64. *Orange Belt District Council of Painters No. 48* v. *NLRB*, 328 F. 2d 534 (D. C. Cir. 1964) (subcontracting of work actually performed on a contractor's job in the union's jurisdiction); *Meat and Highway Drivers, Dockmen, etc.* v. *NLRB*, 335 F. 2d 709 (D. C. Cir. 1964) (contracting of delivery service in area of employer's operation and union's jurisdiction); *District No. 9, IAM* v. *NLRB*, 315 F. 2d 33 (D. C. Cir. 1962) (car-servicing work in union's jurisdictional area); *Retail Clerks Union Local 770* v. *NLRB*, 296 F. 2d 368 (D. C. Cir. 1961) (placing of groceries on shelves in store in union's jurisdiction); *Todd Shipyards Corp.* v. *Marine and Shipbuilding Workers Union*, 344 F. 2d 107 (2d Cir. 1965) (subcontracting of work in shipyard where union had jurisdiction); *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 (9th Cir. 1964) (delivery of milk in area of employer's operation and union's jurisdiction). Other like cases involved performance of services within the area of the contracting employer's operation and the union's jurisdiction. An exception is *Houston Insulation Contractors Association* v. *NLRB*, 357 F. 2d 182 (5th Cir. 1966), now pending in this Court on petition for certiorari, this term, No. 206, in which the Fifth Circuit applied the Board's work-preservation rationale in a product boycott situation. We submit that this decision is wrong for the reasons stated in this brief.

of products—not an *assignment of work.* The target of Rule 17 was the banning of prefabricated products manufactured by other employers at distant locations far from the Philadelphia jobs and the Union's jurisdictional area. It is one thing for a work-assignment rule to direct which employees and trades will handle, process or install materials after they have come to a construction location in the union's jurisdiction. But a rule which controls *what products can in fact come to a job or into the union's jurisdiction, in the first instance, is quite another thing.* Such an embargo rule inescapably controls the relations of the local employer with outside employers and restricts the type of products that can be handled by other employers in the chain of distribution.

It is true that there is some work content in most products, but *that does not mean that the purchaser of a product is assigning work to the manufacturer.* When a purchaser buys a factory-finished product, he is paying for work only in the sense that labor is part of the cost incorporated in the finished product; he is not, in any commercial or realistic sense, subcontracting or assigning work.[65]

Prefabricated doors are products and have been universally so considered. Criticizing the Trial Examiner's reference below to the contractors' purchase of prefabricated doors as "work assignments," the General Counsel, of the Board, excepting to the Trial Examiner's decision, said (Brief, March 20, 1964, p. 1):

> "It is respectfully submitted that the basic error committed by the Trial Examiner was his failure to consider the Board's prior conclusions concerning simi-

65. Thus, the purchase of finished furniture, or panels, or door units, or preglazed windows is not an assignment of work to the manufacturer just because the purchaser might have purchased the products in an unfinished state. To so contend is specious reasoning.

lar subject matter in such cases as *General Millwork* and *Joliet Contractors*. In the former case the Board treated prehung doors as a product and in the latter it treated preglazed sash as a product. *The subject matter in the case at hand, the prefit doors, is in every sense as much a product as the prehung doors and the preglazed sash.*" (Emphasis added.)

In *Wadsworth*,[66] which was the first product boycott case under the Act, the *products* were prefabricated doors, windows, panels, and other components made in Nebraska for installation in Kansas—and, with reference to these, the Board (at p. 806) said that ". . . *Congress considered the 'product boycott' one of the precise evils* which that provision [Section 8(b)(4)(A)] was designed to curb . . ." (Emphasis added.) In *Joliet Contractors*,[67] the boycotted *products* were preglazed sash. In *General Millwork*,[68] the *products* were prehung doors, such as are banned by Rule 17 herein (R. 111).

Prefabricated doors and other building components are recognized by the United States Government and by industry usage to be commercial products, as such.[69]

---

66. *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)*, 81 NLRB 802 (1949), enfd. 184 F. 2d 60 (10th Cir. 1950).

67. *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (7th Cir. 1953).

68. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957).

69. The official "Census of Business" recognizes and classifies prefabricated components as a separate category of building materials. United States Department of Commerce, *Census of Business*, Report Form CB-52A-T (12-18-61).

Leading trade publications of the building and construction industry identify prefabricated doors as products. *Building Supply News*, pp. 100, 103 (March, 1961) reports:

"Pre-hung door units, the second most-used components, are prime examples of the component evolution and its benefits in cost reduction. Originally doors were handmade at the site. Then early mills began to 'prefabricate' them." (Continues on next page.)

The clear distinction between jobsite work and factory-made products is recognized in Section 8(e) itself. Senator Kennedy pointed out the distinction between jobsite work and factory-made products by explaining that the proviso of Section 8(e) does not provide immunity for "boycotts of goods manufactured in an industrial plant for installation at the jobsite . . ." [II Leg. Hist. (1959), p. 1433; 105 Cong. Rec. 17900].

The Board and the Second Circuit have given effect to this distinction between the purchase of products and jobsite work in what is a much "closer" case than the purchase of prefabricated building components. In *Island Dock*,[70] it was held that a jobsite contractors agreement to give the union's jobsite members the work of handling the final delivery of ready-mix concrete *was an unlawful agreement to boycott the delivery of a purchased product.*[71] The Board said (p. 490):

"Like trusses, the advantages of millwork components are obvious. And they are even more universal than the benefits of trusses. Pre-hung doors can be used in virtually all houses and prefabricated window components may be used in almost any room of a single-family house."

See also the numerous illustrations of like recognition referred to in NWMA's Brief in No. 110 (pp. 55-57) and the *amicus* brief of Associated General Contractors of America, et al., in this case (pp. 23-25).

70. *International Brotherhood of Teamsters, etc., Local 294 (Island Dock Lumber, Inc.)*, 145 NLRB 484 (1963), aff'd 342 F. 2d 18 (2d Cir. 1965).

71. To the same effect, see *Drivers, Salesmen, etc. (Threlfall Construction Co.)*, 152 NLRB No. 55, 59 LRRM 1131 (1965), aff'd 361 F. 2d 547 (D. C. Cir. 1966), wherein it was again held that the "mixing and pouring of ready-mix concrete at a construction site is not construction work *but merely the delivery of a material or product.*" (Emphasis added.) On appeal, in distinguishing between off-site products and on-site subcontracting of work, the Court explained that a purpose of the proviso was to avoid forcing union men to work alongside nonunion men. It pointed out that there was no such purpose to be served in the case of products manufactured away from the jobsite.

"The contract between Wikstrom and Island Dock did not call for raw materials and water *but a finished product,* liquid concrete . . ." (Emphasis added.)

There is another vital distinction between agreements regulating work done in the handling, processing or installation of materials after they have come to a job and agreements dictating what products can or cannot come to a job in the first instance. The first concerns work and labor; the second concerns products which are commodities —articles of commerce. As long as labor continues to be "labor," employers and unions enjoy certain freedom of action concerning it. By statute,[72] labor is not a "commodity or article of commerce." Unions and employers may take concerted action concerning it which would otherwise be unlawful. Competing employers may act in concert regarding labor through multiple-employer bargaining, even though labor is a major cost factor and may substantially affect prices and competition. However, when labor is utilized in the productive process, it is no longer labor but becomes an intangible and unidentifiable part of the manufactured product. This resulting product is a commodity and is an article of commerce. Concerted action restraining the production, distribution and use of the product by employers (and by unions acting with them) is unlawful.[73]

So, in the present case, Rule 17's ban on prefabricated doors was not a work-assignment restriction but, rather, was an embargo of a manufactured product—and plainly within the proscriptions of Section 8(e). And the situation is not changed because the purchase of a particular product might increase or decrease the amount of work to be

72. Clayton Act, ch. 323 § 6, 38 Stat. 731 (1914), 15 U. S. C. § 17.

73. And this is true whether or not the unlawful restraint is accomplished through the medium of collective bargaining. Cf. *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965).

done by the employees of the purchaser. In other words, the desire of employees to retain or obtain work cannot be permitted to dictate the products that can be purchased, used or sold by an employer.[74]

We, therefore, submit that the Board's narrow and limited construction of Section 8(e) is wrong, and that this section, in accordance with its plain language and the legislative intention, proscribes product boycott agreements such as Rule 17 herein.

II. RULE 17 IS UNLAWFUL EVEN UNDER THE BOARD'S RESTRICTIVE INTERPRETATION OF SECTION 8(e).

We believe that product boycott agreements in which the objective of boycotting products of other employers is spelled out (as in Rule 17), or those in which such objective is implicit, violate Section 8(e) without regard to so-called "primary" and "secondary" criteria and like semantics—and we urge that the Court accept that principle in its decision.

In addition, however, we submit that the Board in this case has misapplied its own rules and that, even under the Board's narrow interpretation, Rule 17 demonstrably violates Section 8(e).

Therefore, applying the Board's own rules *arguendo*, Rule 17 violates Section 8(e) because (1) it has direct and substantial force and effect outside the work unit; (2) it substantially affects working and production conditions at the plants of door manufacturers; and (3) its objective is the protection of job opportunities for union members generally—outside as well as within the work unit.

74. It is no answer that the contractors "agreed" to Rule 17. As Justice Frankfurter pointed out in *Sand Door*, 357 U. S. 93, 106-07 (1958), the agreement may have been far from voluntary. Moreover, whether or not an employer voluntarily acquiesces to such an agreement, the product embargo is there, and it is against that restraint and the agreement causing it that Section 8(e) is directed.

A. Rule 17 has Substantial and Direct Force and Effect Outside the Work Unit.

As we have shown, the Union employed Rule 17 to establish an area-wide embargo of prefabricated doors. The four jobs boycotted herein were pawns in the Union's overall campaign to eliminate prefabricated doors from construction jobs in Philadelphia. Causally the boycotts blocked the channels of distribution, and not only affected but dictated the products which could be handled by manufacturers and distributors serving the Philadelphia market. In the case of manufacturers such as Oxford (which manufactured only formica factory-finished doors), the Rule banned the products from the market completely. In the case of other door manufacturers, it banned from Philadelphia their entire line of prefabricated building components.

The embargo effect of a local boycott of factory-finished products was succinctly stated in the "Kitchen Cabinet" case,[75] as follows (pp. 60-61):

> "... the defendants in order to achieve a certain local result were in fact directly interfering with the shipping in of cabinets from Indiana and woodwork from Kentucky; *that although their purpose may have been entirely local in character, their actions in attempting to achieve that purpose necessarily and directly resulted in keeping out of the state of Illinois such finished articles as had previously been shipped from Indiana and elsewhere. . . .*" (Emphasis added.)

Similarly, in *Joliet Contractors*,[76] the Seventh Circuit appropriately criticized the Board's failure to take cognizance of the embargo effect of the Glaziers' Union boy-

75. *United States* v. *Painters District Council No. 14 of Chicago*, 44 F. 2d 58 (N. D. Ill. 1930), aff'd *per curiam*, 284 U. S. 582 (1931).

76. *Joliet Contractors Association* v. *NLRB*, 193 F. 2d 833 (7th Cir. 1952).

cott of preglazed sash from the Joliet construction area (p. 840):

> "The Board's reasoning disregards the real effect of a secondary boycott on the flow of building materials in interstate commerce. *It ignores the fact that the real effect of a secondary boycott in the building and construction industry is the stoppage of the flow of building materials from the manufacturers to the dealers and thence to the contractors. . . .*" (Emphasis added.)

Therefore, it cannot be realistically disputed that the external impact and effect of Rule 17 *outside* the work unit abundantly satisfies the so-called "secondary" impact test of the Board's Section 8(e) theories.

B. By Dictating the Kind of Doors That Could or Could Not Be Used in the Philadelphia Market, Rule 17 Had Substantial and Direct Effect on Work and Production in the Manufacturing Plants of the "Other Employers."

Whether a product is made by members of a particular union or by no union, whether it is made by workers who are not paid so-called "standard" wages, or whether the product is processed through the finishing or sizing department—these are matters which directly concern working conditions at the plant of manufacture. If a construction union blacklists any of these products because of any of the foregoing conditions, such products can no longer be made for that market. Goods so listed are "hot goods," and the impact on the workers working in the producing plant is the same whether they lose work because they are nonunion or because the finishing or prefabrication department has been shut down.[77] Therefore, in this respect, too, it would seem that the Board's "secondary" impact rule is satisfied.

---

77. As stated above, if Philadelphia had been Oxford's only market, the whole plant would have had to shut down.

C. Rule 17 Violates Section 8(e) Because Its Purpose Was the Protection of Work Opportunities for Union Members Generally, Rather Than Only Those in a Specific Work Unit.

An exception the Board makes to the boycott immunity under its "work preservation" rationale is that the "protection" must be limited to, and must not extend beyond, the work unit of the immediate employer. Thus, in *Cardinal Industries*,[78] the Board held unlawful an agreement to boycott prefabricated roof trusses because the purpose was to protect work opportunities in the area of the boycotting union's Cincinnati jurisdiction, rather than only work at the job of the employing contractor in that area.

The Board has just amplified and applied this principle in the *Alco* case[79] in a way which, we submit, virtually concedes the error of its Section 8(e) finding of no violation below under the Board's own interpretation of this section.

Alco involved a strike and a Section 8(b)(4)(B) violation, but the decision is applicable here because the Board applied the same "work preservation" principles there that it applies in its Section 8(e) cases. In that case, Local Union 2-P represented the employees at employer Alco's Baltimore rotogravure printing plant. The Lithographers and Photoengravers International Union, AFL-CIO, with which Local 2-P was affiliated, had numerous other local affiliates in printing plants in the East Coast area, including Local 1-P, which represented employees at the New York plant of Printing Developments, Inc. PDI developed an electronic scanning process which eliminated certain steps in the printing process. This was of concern to Local 2-P and to other locals affiliated with the International because this technological development would have

78. 136 NLRB 977 (1962).

79. *Baltimore Lithographers and Photoengravers Union, Local 2-P, etc. (Alco-Gravure, Division of Publication Corporation)*, 160 NLRB No. 90, 63 LRRM 1126 (September 26, 1966).

reduced the work available for union members at Alco and other similar plants. There was a good deal of correspondence and action by the International and the locals endeavoring to prevent the use of this new process.

The controversy arose when Alco decided to purchase PDI scanned positives for use at its Baltimore plant.[80] The Board described this as follows:

> "The dispute herein arose when, on or about December 6 or 7, 1964, Local 2-P first learned about Alco's plans to use scanned positives in production, which could result in the diminution or elimination of certain unit work performed by Alco's photographers.
>
> "Charles Ochs, president of Local 2-P, on learning of Alco's decision, spoke to Alco's plant manager, George Meiser, protesting that the use of PDI scanned positives threatened the elimination of unit work. In their ensuing discussions, Ochs indicated that he considered the proposed use of scanned positives to be a change in Alco's operations, amounting to subcontracting of unit work, in violation of the parties' collective-bargaining agreement."

After a series of negotiations, Local 2-P refused to process or work on scanned positives purchased by Alco from PDI. Against 8(b)(4)(B) charges, the union contended that Alco's purchase of PDI scanned positives was a "subcontracting of unit work" in violation of a contract restriction, that the union's objective was only "to preserve the work of Alco's employees in the bargaining unit," and that such conduct was protected by the "primary strike or primary picketing" proviso of Section 8(b)(4)(B).

The Board rejected all these contentions and found Local 2-P and the International in violation of Section 8(b)(4)(B). The basis of the Board's holding was that Local

80. It appears that Local 2-P's only objection was to Alco's purchase of work-saving products from PDI. Local 2-P had no dispute or contact with PDI, nor was it concerned with working conditions there.

2-P's strike at Alco was not *solely* to protect work in Alco's work unit, but had also the purpose of protecting work for union members in other work units. The Board said:

> "The Board has long held, with Court approval, that a union's strike to preserve the work of employees in the bargaining unit represented by it is primary action which is protected by the Act. However, a similar strike, where an object thereof is to preserve work for union members generally, exceeds the legitimate interests of the union in the bargaining unit and, therefore, constitutes unlawful secondary conduct within the meaning of Section 8(b)(4)(i) and (ii) (B) of the Act. In our view, the instant case falls into the latter category. The preponderance of all the evidence contradicts Respondents' contention that the strike herein was in support of a purely localized contract dispute between Local 2-P and Alco's Baltimore plant . . . The obvious intent of their efforts, resulting in the International's policy mandate and Local 2-P's compliance therewith, was to assist all union members generally in protecting their jobs from the encroaching competition of the PDI scanner."

The Board held the International guilty because:

> ". . . Respondent International engaged in a coordinated effort with Local 2-P and other locals to formulate a general policy for all locals having rotogravure employers in their jurisdiction with respect to PDI scanned positives. The obvious intent and purpose of such a policy was to assist all Union members generally . . ."

The *Alco* case closely parallels the instant case. In *Alco*, PDI, the manufacturer of the work-saving scanned positives, was in the same relative position as the manufacturers of prefabricated doors in the instant case. There the International sought to protect work for its affiliated locals by banning PDI scanned positives from local plants. In this case, the Council enforced an even more rigid ban against prefabricated doors *to protect work for members*

of the 27 affiliated locals in the Union's five-county jurisdictional area (R. 89). In *Alco,* Local 2-P sought to further its work-protection purpose by a partial strike at Alco. In this case, the Union's broad "protection" objective not only was sought but was accomplished by the actual boycott of prefabricated doors on four jobs and the enforcement of Rule 17 on all jobs in the entire Philadelphia area (R. 89). It is apparent that the enforcement of Rule 17 on the four jobs herein was but part of the over-all boycott program, and that the employment and enforcement of Rule 17 on these jobs was to encourage and cause compliance therewith by all contractors in the area. It is undisputed, and in fact it was repeatedly asserted by the Union, that the object of Rule 17 was to ban prefabricated doors from its entire jurisdiction (R. 86-87, 109-113).

It is more abundantly clear in the instant case than it was from the strike in *Alco* that the Council's promulgation and enforcement of Rule 17 had the objective of preserving work for Union members throughout the Union's jurisdictional area generally. It was not, in any realistic sense, "purely a localized contract dispute" between the Council and the individual contractors on the four jobs. As we have seen, early in 1963 the Council complained to the International president that prefabricated doors were coming *into the area* (R. 155). The Union's campaign was to prohibit prefabricated doors from coming *into the area* by the policing of Rule 17 by Union agents (R. 86-87, 91, 109-113). All contractors *in the area* had to accept Rule 17 as a part of their association contracts or individual contracts. Frouge, a foreign contractor, had to accept it because his contract with the International Union required him to conform to *local area rules* (R. 10). Union Manager Gray testified that if a Union member were "building a doghouse or a home" for Mr. Mahin in Philadelphia, Rule 17 would apply (R. 112).

Therefore, it is abundantly clear that the purpose of Rule 17 was in no sense limited to any particular job but, rather, was intended to "assist union members generally" by banning prefabricated doors not from one job but from every job in every work unit covered by the 27 local unions in Philadelphia. Thus, even under the Board's own limited rules, Rule 17 constitutes a flagrant violation of Section 8(e).

III. RULE 17, VIOLATIVE OF SECTION 8(e) PROPER, IS NOT SAVED BY THE CONSTRUCTION INDUSTRY PROVISO.[81]

Rule 17 is not saved by the construction industry proviso which, as stated in other connections, applies only "to the contracting or subcontracting of work to be done at the site of the construction . . ." and "does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite . . ."[82] [II Leg. Hist. (1959), p. 1433; 105 Cong. Rec. 17900. See also, H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., p. 39; I Leg. Hist. (1959), p. 943].

There was post-legislative disagreement between Senator McNamara [II Leg. Hist. (1959), p. 1815; 105 Cong. Rec. 19785] and Representative Kearns [statement printed in Record herein, pp. 136-38; II Leg. Hist. (1959), p. 1861; 105 Cong. Rec. 20005] as to whether the proviso applies to work "actually done" at the jobsite or to work which "could be done" at the jobsite. However, the Board and

---

81. Since the Board argues that Rule 17 is outside the entire scope of Section 8(e), it must necessarily take the position that the proviso, as such, is not here involved (Board's Brief, pp. 32-34).

82. In its petition for certiorari herein, the Board conceded the inapplicability of the proviso to Rule 17 (p. 12 n. 16): "This proviso was not satisfied here, since the doors were not manufactured on the job site." The Board modified this statement by special memorandum filed herein dated May, 1966, apparently to avoid what it considered an inconsistency in position; but, in any event, the point, as originally stated, is correct.

the courts have agreed with Representative Kearns that the proviso applies only to work *actually performed* at the jobsite—and not to work which *could be performed there.*[83]

It is undisputed that all the doors involved herein were manufactured at plants far distant from the construction site (R. 11-16); and Rule 17, therefore, is not saved by the proviso.

---

83. In *Cardinal Industries,* 136 NLRB 977 (1962), the Board said (pp. 988, 989):

> "The Respondents argue, however, that the scope of the proviso goes further and applies as well to any offsite work that '*could be done* at the site of construction' and 'would be done [there] if not contracted out.' Therefore, they say, it is permissible under the proviso to include in a contract a fabrication type of clause which would bar from use at a jobsite, except where produced under union contract conditions, prefabricated materials or components that are the product of work that might otherwise have been done at the construction site. With that interpretation of the proviso, I am unable to concur. A reading of the proviso and its legislative history reveals that Congress—possibly because it recognized that construction work at a jobsite, though handled by various crafts, involves in a sense a single integrated operation—meant to do no more than to preserve the status quo with regard to express or implied agreements, not uncommon in the industry, fixing the conditions under which the entire jobsite operation is to be run, whether as a union job or otherwise. To me, it seems a distortion of the plain meaning of the statutory words, 'work *to be done* at the site of construction' to read them as synonymous with 'work that *could be done*' or 'work that *might be done.*' . . ."
>
> • • • • •
>
> "The contrasting language used in the broader garment industry exemption, contained in the second proviso to 8(e), confirms the conclusion I reach here, that Congress did not intend the construction industry exemption to extend to work done *away* from the actual site of construction, even though such work might be viewed as part of the construction process and is of a kind that may feasibly be done at the construction site."

See, also, *Island Dock Lumber, Inc.*, 145 NLRB 484 (1963), aff'd 342 F. 2d 18 (2d Cir. 1965); and *Threlfall Construction Co.*, 152 NLRB No. 55, 59 LRRM 1131 (1965), aff'd 361 F. 2d 547 (D. C. Cir. 1966).

IV. BY FORCING AND REQUIRING THE CONTRACTORS TO ENTER INTO RULE 17, WHICH IS UNLAWFUL UNDER SECTION 8(e), THE UNION VIOLATED SECTION 8(b)(4)(A).

Rule 17 being unlawful under Section 8(e), the Union violated Section 8(b)(4)(i) and (ii)(A) through its enforcement of it by the same inducement of employees and coercion of employers as caused its violation of Section 8(b)(4)(i) and (ii)(B) (R. 28). The Board and the courts have consistently held that the enforcement of an unlawful Section 8(e) rule constitutes an "entering into" within the meaning of Section 8(b)(4)(A).[84]

V. THE BOARD'S BRIEF FAILS TO SUSTAIN THE PRODUCT BOYCOTT IMMUNITY WHICH IT SEEKS TO WRITE INTO SECTION 8(e).

We have endeavored to answer the main points of the Board's brief in the course of the preceding argument. We mention here certain matters which may call for further comment.

The implication at page 12 of the Board's brief that the existence of a "work preservation" objective negates the existence of a proscribed objective and is lawful under 8(e) has been answered (*supra*, pp. 12-18). However, we call attention here to the Board's attempt to inject a "principal objective" concept into the picture. There is nothing in the Act or the legislative history that warrants this attempt to make a "principal purpose" of "work preservation" a basis for Section 8(e) immunity. Section 8(b)(4)(B) (then "(A)") was amended in conference in 1947 to avoid a construction that a lawful purpose would

84. *District 9, International Association of Machinists, etc. (Greater St. Louis Automotive Trimmers and Upholsterers Association, Inc.)*, 134 NLRB 1354, 1360 (1961), aff'd 315 F. 2d 33 (D. C. Cir. 1962); *Los Angeles Mailers Union No. 9 (Hillbro Newspaper Printing Company)*, 135 NLRB 1132, 1136 (1962); aff'd 311 F. 2d 121 (D. C. Cir. 1962).

override "an (unlawful) object," and the same principle should apply under Section 8(e) [II Leg. Hist. (1947), p. 1623; 93 Cong. Rec. 6859. See also NWMA Brief in 110, pp. 35-36; and *supra*, p. 14 n. 16].

As we have shown (*supra*, pp. 19-34), the Board's contention (Board's Brief, pp. 12-22) that the legislative references to "hot cargo" and conventional "secondary boycott" definitions justify a narrow construction of Section 8(e) is unsound. These references were intended by proponents as illustrative only—and not as excluding other boycotts, such as "product boycotts." The same references to conventional "secondary boycott" definitions and illustrations were made repeatedly during the legislative debates on the Taft-Hartley Act in 1947, but that act has never been strictly limited to a rigid "primary-secondary" dichotomy.[85] By both laws, Congress intended to reach certain boycott situations which came within the statutory language, although they might not exactly fit the pattern of "stock" secondary boycott definitions.[86] It was for that reason that, instead of proscribing "secondary boycotts" as such, the specific conduct sought to be prohibited was spelled out in the law. This was explained by Mr. Justice Frankfurter in *Local 1976, United Brotherhood of*

85. In common understanding and usage, product boycotts are viewed and referred to as secondary boycotts because the union boycotts one employer to prevent the use of products made by another employer. (This is, of course, the exact language of the statute.) This is because the embargo restraint is the same whether the boycotting union blacklists the objectionable products because they do not have a union label, or because they are made under working conditions objected to by the union, or because they are more completely fabricated than the union desires.

86. The union-sponsored Elliott Bill [I Leg. Hist. (1959), pp. 687, 751] and the Shelley Bill [I Leg. Hist. (1959), pp. 865, 929] expressly incorporated the primary-secondary formula in their Section 8(b)(4)(B) proposals; and both, of course, were rejected in favor of the Landrum-Griffin Law, which contained no such limitation.

Carpenters v. *NLRB*, 357 U. S. 93 (1958), as follows (p. 98):

> "Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8(b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . ."

The Board explained this in *Sound Shingle*[87] (p. 1161):

> "It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the *only* kind Congress intended to reach. . . ."

We have shown (*supra*, pp. 23-34) that the many statements concerning Section 8(e) after it emerged in the legislative proceedings, as well as the language employed, reveal that no immunity for product boycotts was intended.

In sum, the Board has failed to demonstrate any valid reason why in the case of agreements to boycott prefabricated products made by other manufacturers, the plain proscriptions of Section 8(e) should not be given their stated effect.

At page 18, footnote 16, of its brief, the Board argues that Section 8(e) should be narrowly limited because Section 8(e) is a complement to Section 8(b)(4)(B). But this proves quite the contrary because Section 8(b)(4)(B)

87. *Washington-Oregon Shingle Weavers' Council (Sound Shingle Co.)*, 101 NLRB 1159 (1952), enfd. 211 F. 2d 149 (9th Cir. 1954).

has never been limited to the narrow scope of the Board's definition of "hot cargo"[88] (*supra*, pp. 37-41).

Also, the point stated by the Board at page 18, footnote 16, concerning farmed-out struck work (the "ally doctrine"), does not support the Board's position. An "ally" who, by arrangement with a struck employer, is performing work normally performed by striking employees may lawfully be struck. This was and still is the law. But this ally doctrine does not apply to the boycott of products of suppliers and has nothing to do with the boycott of prefabricated products. Contrary to the Board's inference, Senator Goldwater's comment regarding the ally situation reveals his belief that other strikes or agreements against the handling of products of others were proscribed.

At page 22, the Board again describes the boycott impact of work-preservation agreements as only "incidental." As previously demonstrated, this obscures the real situation. Such an agreement has *substantial dual objectives* i.e., the preservation of work and the boycott of products. Only by accomplishing the boycott objective can the work-protection purpose be accomplished.

The Board's suggestion (Board's Brief, pp. 23-24) as to the reason why opponents eventually accepted the broad language of Section 8(e) is pure speculation. A careful review of the legislative record reveals that Congressmen Kennedy and Thompson fought to the bitter end to limit the broad sweep of Section 8(e), and that they eventually capitulated after having gained the construction and garment provisos in conference. These congressmen then supported the conference bill, as agreed. Significantly, Sena-

88. And, of course, the Board's definition of "hot cargo" is narrow only because the Board presumes to limit what can make the cargo "hot." As explained, however, a product becomes "hot" when a union blacklists it as "hot"; and the embargo impact is the same whether the union's reason is prefabrication, work standards, union label, or some other restriction.

tor Morse, in commenting on the agreed conference bill, explained that Senator Randolph had tried very hard, but unsuccessfully, to get an exemption from Section 8(e) for work-standards agreements in the coal industry [II Leg. Hist. (1959), p. 1428; 105 Cong. Rec. 17884]. Senator Randolph, as well as others concerned, fully realized the scope of Section 8(e) as finally agreed on in conference.

The Board's attempt to distinguish *Joliet Contractors, General Millwork,* and *Allen Bradley* at pages 26-27, footnote 24, plainly does not report the facts. True, as we have demonstrated, the targets of the unions in all these cases were the products of other employers. But in each case the union had dual objectives—one target was the boycotted products; the other was work preservation. The Board's representations to the contrary are absolutely wrong.[89] The *Allen Bradley* case[90] is rife with evidence that work preservation for contractor employees was a union objective. One illustration was Local 3's boycott of prefabricated control boards (pp. 737-38):

> "It is self-evident that it is uneconomical to have a practice which necessitates the unwiring and dismantling of completely fabricated control-boards, which are now used universally in the distribution of electric power to innumerable appliances for pumping, air-conditioning, elevator service, lighting, heating, and other purposes, *and then require the refabrication of such boards at the site of the building in which the board is to be erected.*"
>
> • • • • •
>
> "It did not concern them that all this work had to be done previously at the factory, in order to test the apparatus and demonstrate that it was working properly, and that, after such test, additional unnecessary

89. See *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606, 610 (7th Cir. 1953), quoted, *supra*, p. 39.

90. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 41 F. Supp. 727 (S. D. N. Y. 1941).

> work at the factory was required to disassemble the board and ship the current-carrying parts separately. A stand was made and a strike was threatened, unless an agreement should be entered into which would, as the union phrased it, '*preserve the work opportunities of the local union.*' " (Emphasis added.)

At pages 27-29, the Board apparently contends that this Court's decision in *Fibreboard*,[91] dealing with collective bargaining obligations supports its construction of Section 8(e) because (1) the subcontracting of maintenance work to be performed in the same plant under the same working conditions is a mandatory subject of bargaining under Section 8(a)(5); (2) such an agreement should, therefore, be lawful under Section 8(e); and (3) since an agreement to boycott prefabricated products may affect the amount of work available to unit employees, it, too, should be lawful under Section 8(e). This is indeed specious reasoning—the case is inapposite.

In the first place, as this Court pointed out, "contracting out" and "subcontracting" have no precise meaning, and the Court's decision (which was concerned only with Fibreboard's duty to bargain) was strictly limited to the specific form of subcontracting there involved and does not encompass other forms of "subcontracting."[92] Agreements to boycott prefabricated products manufactured by employers at distant places, even viewed by analogy, are far outside

---

91. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964).

92. *Ibid.*, p. 215:

> "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.[8]"

> "8. As the Solicitor General points out, the terms 'contracting out' and 'subcontracting' have no precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case. . . ."

the criterion of mandatory bargaining specified by this Court in *Fibreboard*.

But even more basic is the fact that the purchase of products is not an assignment of work (*supra*, pp. 43-48). Mr. Justice Stewart, speaking for the concurring Justices, reiterated (at pp. 217-19) that the decision is limited strictly to the type of subcontracting there involved and stressed that it does not apply to the many other management functions which, directly or indirectly, might affect unit workers—i.e., one illustration was the purchase of "labor-saving machinery." Management action relating to technological change (which, of course, is an essential feature of factory prefabrication) was particularly emphasized as being outside the scope of the decision.[93]

There is nothing in *Fibreboard* which supports the Board's decision below, and such inference as may be drawn therefrom seems to counsel against union contractual embargoes of purchased products.[94]

At pages 30-32 of its brief, the Board says that certain writers support its position. However, the writers, on the subject of Section 8(e), have been principally concerned with whether that section bars *all* work subcontracts or only *some* such subcontracts. For example, compare Dannett,[95] who argues that Section 8(e) bans restrictions on all work subcontracts; and Schwartz,[96] who concedes that this section bans boycotts of prefabricated products but argues that, in the area of work subcontracts, some are lawful. None of

93. *Ibid.*, pp. 223, 225-26.

94. It is not farfetched to believe that if the Board succeeds in validating product boycott agreements under Section 8(e), it will next argue conversely that such agreements are mandatory subjects of bargaining.

95. Dannett, *The Legality of Subcontracting Provisions Under Section 8(e)*, in Slovenko (Ed.): Symposium on the Labor-Management Reporting and Disclosure Act of 1959, p. 905 (1961).

96. Schwartz, *Comments*, in *ibid.*, p. 911.

the writers have considered in depth or come to grips with the question of the boycott of prefabricated products such as is before the Court in this case.

The present case does not require a decision on the controversial question of whether Section 8(e) bans *all* work-subcontracting restrictions. As we have shown (*supra*, pp. 43-48), the purchase of products is not an assignment or subcontracting of work and, in any event, it is demonstrably clear from the statutory language employed, the legislative intent, and relevant decisional principles, that Section 8(e) proscribes the kind of product boycott dictated by Rule 17 in this case.

VI. THE EXEMPTION OF PRODUCT BOYCOTT AGREEMENTS WHICH THE BOARD WOULD WRITE INTO SECTION 8(e) WOULD BE DETRIMENTAL TO THE ECONOMY AND THE PUBLIC INTEREST.

Immunity for product boycott agreements such as Rule 17 would enable unions throughout the United States to draw boycott walls around their respective communities banning the needed technologically improved products of many industries. The Electrical Workers Union involved in *Allen Bradley* could resume its boycott of prefabricated electrical fixtures in New York. The Glaziers Union involved in *Joliet Contractors* could resume its boycott of preglazed windows in the Chicago and Joliet metropolitan areas.[97] The Carpenters Union involved in *General Millwork* could resume its boycott of prehung doors in Cincinnati. Therefore, there is again presented in this case the fundamental question of whether labor, as one segment of society, is justified in taking self-help measures at the expense of all other segments. We submit that labor does not have such immunity under Section 8(e).

97. As the Court stated [193 F. 2d 833, 840 (7th Cir. 1952)]: "... if the Union is permitted to pursue its illegal objective, the sale of preglazed material in the Joliet area will become a thing of the past, as it has in the Chicago area."

We respectfully request that, in its consideration of this point, the Court take into account NWMA's Brief in No. 110 (pp. 52-66) and the able representations of the *amici curiae* in Nos. 110 and 111 concerning the great detriment to the economy and to the public interest which would result if product boycott agreements were granted immunity under Section 8(e).

CONCLUSION.

For the reasons set forth above, we submit that the agreement to boycott prefabricated doors embodied in Rule 17 violated Section 8(e), and that the Court's decision below so holding should be affirmed.

Respectfully submitted,

CHARLES B. MAHIN,
Counsel for National Woodwork Manufacturers Association, et al.

October 10, 1966.

APPENDIX.

STATUTE INVOLVED.

The statutory provisions involved in this Cause No. 110 and in Cause No. 111 are Section 8(b) (4) (A) and (B) and Section 8(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.* which are as follows:

"Sec. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

* * * * *

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . ."